

# Articles

## MORAL NUISANCE ABATEMENT STATUTES

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**ABSTRACT**—On May 19, 2021, Texas enacted S.B. 8—also known as the Texas Heartbeat Act—which prohibits almost any abortion of a fetus once a heartbeat can be detected, effectively banning abortions after only six weeks of pregnancy. Just as controversially, S.B. 8 also specifies that it is enforceable exclusively through private civil actions, and it allows any private person to sue anyone who “performs,” “induces,” or “knowingly . . . aids or abets the performance or inducement of an abortion,” seeking injunctive relief and statutory damages of \$10,000 per violation. The passage of S.B. 8 immediately led to calls for, and predictions of, copycat laws. Within weeks, legislators in several states had indicated their intent to pass identical bills, while others warned that the law’s enforcement mechanism could be applied to a range of lawful activities, from gun possession to facilitation of same-sex marriage. Indeed, states have already passed laws enabling individuals to file suit against schools that teach “critical race theory” or refuse to exclude transgender students from bathrooms or athletics. Numerous legal scholars, judges, and commentators have decried this “unprecedented” enforcement mechanism, especially the creation of a private cause of action for uninjured individuals with no connection to the person seeking an abortion. Critics have likewise labeled as unprecedented the fact that S.B. 8 enables plaintiffs to file suit anywhere in Texas, denies defendants certain well-recognized affirmative defenses, compels losing defendants to pay plaintiffs’ fees and costs, and provides a “bounty” for successful plaintiffs.

In fact, the only truly unprecedented aspect of S.B. 8 is that it entirely displaces public enforcement with private enforcement. Virtually every other part of its enforcement scheme—the deputization of uninjured private citizens, the broad venue provision, the creation of civil “bounties,” the disallowance of certain defenses, and the provision for plaintiffs’ fees and costs—enjoys ample precedent. Beginning in the nineteenth century and continuing throughout the twentieth, state legislatures across the country passed hundreds of laws enabling any private citizen, regardless of personal injury or interest, to bring suit to remedy a range of supposed social ills—from the sale of liquor to the sale of sex, from air and water pollution to the

unlicensed practice of dentistry. Although these laws differed considerably, their hallmark was their empowerment of uninjured individuals to bypass state authorities and directly use the machinery of the courts to remedy something the legislature considered a harm to the public at large.

In this Article, I argue that S.B. 8 is best understood as the latest of these laws, albeit taken to a new extreme in its foreclosure of any public enforcement. Drawing deeply on original archival research, this Article provides the first comprehensive history of these laws, which I call “moral nuisance abatement statutes.” The authors of these statutes took inspiration from the common law of public nuisance, but they eliminated its “special injury” requirement, instead allowing uninjured individuals to bring suit to abate so-called nuisances. Although citizen-suit provisions are common in state and federal statutes, moral nuisance abatement statutes go further than any other private enforcement schemes, not just by dispensing completely with the demand of injury but also by shifting burdens of proof, foreclosing common defenses, and providing financial incentives for plaintiffs—all in the name of more effectively attacking a supposed cancer on the commons. Moral nuisance abatement statutes—laws such as S.B. 8—are likely to spread. This Article thus historicizes these statutes, clarifying their past, claiming for them a significant present, and providing some clues to predict their future. The purpose of this analysis is not to minimize the real ways that S.B. 8 departs from earlier moral nuisance abatement statutes. Rather, its point is to identify these statutes as belonging to a common class, which better enables us to analyze their spread, impact, similarities, differences, and power.

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## INTRODUCTION

On May 19, 2021, Texas enacted S.B. 8—also known as the Texas Heartbeat Act—which instantly became one of the most widely discussed statutes in the United States. S.B. 8 prohibits almost any abortion of a fetus once a heartbeat can be detected,<sup>1</sup> effectively banning abortions after only six weeks of pregnancy.<sup>2</sup> Just as controversially, S.B. 8 also specifies that it “shall be enforced exclusively through . . . private civil actions,”<sup>3</sup> enables “[a]ny person” (other than a government official) to sue anyone who “performs,” “induces,” or “knowingly . . . aids or abets the performance or inducement of an abortion,” and allows for injunctive relief, statutory damages of not less than \$10,000 per violation, and costs and attorneys’ fees.<sup>4</sup> The passage of S.B. 8 sparked protests across Texas<sup>5</sup> and around the

<sup>1</sup> TEX. HEALTH & SAFETY CODE §§ 171.203(b), 171.204(a).

<sup>2</sup> Neelam Bohra, *Texas Law Banning Abortion as Early as Six Weeks Goes into Effect as the U.S. Supreme Court Takes No Action*, TEX. TRIB. (Sept. 1, 2021), <https://www.texastribune.org/2021/08/31/texas-abortion-law-supreme-court/> [https://perma.cc/HWX2-4YM9].

<sup>3</sup> TEX. HEALTH & SAFETY CODE § 171.207(a).

<sup>4</sup> *Id.* § 171.208.

<sup>5</sup> Hojun Choi, Michael Williams & Catherine Marfin, *Thousands Pour Into Downtown Dallas to Rally for Abortion Rights and to Blast Texas’ SB 8 Law*, DALL. MORNING NEWS (Oct. 2, 2021, 2:37 PM), <https://www.dallasnews.com/news/2021/10/02/thousands-pour-into-downtown-dallas-to-rally-for->

country.<sup>6</sup> It also led to calls for, and predictions of, copycat laws.<sup>7</sup> Within weeks of the law's passage, legislators in Arkansas, Indiana, Florida, Ohio, Oklahoma, and South Dakota had indicated their intent to pass similar or identical bills,<sup>8</sup> and several states have since succeeded in passing copycat laws.<sup>9</sup> Other commentators suggested that left-leaning states could “apply the Texas bounty approach to gun control.”<sup>10</sup> Pro-gun activists have issued

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abortion-rights-and-to-blast-texas-sb-8-law/ [https://perma.cc/3RN8-9RJ3]; Russell Falcon, *Texas Abortion Bill Draws Protesters and Supporters to State Capitol—Either to Praise It or Stop It*, KXAN (Sept. 18, 2021, 8:00 PM), https://www.kxan.com/news/texas-politics/texas-abortion-bill-draws-protesters-and-supporters-to-state-capitol-either-to-praise-it-or-stop-it/ [https://perma.cc/34E2-5F8N].

<sup>6</sup> Elissa Miolene & Tasnim Ahmed, *Unprecedented Texas Senate Bill 8 Rattles Bay Area's Pro-Choice Activists*, PENINSULA PRESS (Oct. 20, 2021), https://peninsulapress.com/2021/10/20/unprecedented-texas-senate-bill-8-rattles-bay-areas-pro-choice-activists/ [https://perma.cc/N7SA-BC7K].

<sup>7</sup> *Texas' Radical Abortion Ban Could Lead to Copycat Bills. Here's What to Know.*, ACLU (Oct. 13, 2021), https://www.aclu.org/news/reproductive-freedom/heres-what-to-know-about-texas-radical-new-abortion-ban/ [https://perma.cc/H5Q6-H533]; MODEL STATE HEARTBEAT ACT (NAT'L ASS'N OF CHRISTIAN LAWMAKERS 2021), https://christianlawmakers.com/wp-content/themes/nacl-simple-theme/assets/docs/20210722\_NACL\_NLC\_Heartbeat\_Model.pdf [https://perma.cc/C5QJ-QHQ2].

<sup>8</sup> Oren Oppenheim, *Which States' Lawmakers Have Said They Might Copy Texas' Abortion Law*, ABC NEWS (Sept. 3, 2021, 3:10 PM), https://abcnews.go.com/Politics/states-lawmakers-copy-texas-abortion-law/story?id=79818701 [https://perma.cc/2T45-RJGF]; see also Alison Durkee, *Ohio Bill Copies Texas' Abortion Ban—And Goes Further. Here's Which States Could Be Next.*, FORBES (Nov. 3, 2021, 10:04 AM), https://www.forbes.com/sites/alisondurkee/2021/11/03/ohio-bill-copies-texas-abortion-ban-and-goes-further-heres-which-states-could-be-next/ [https://perma.cc/3QZ8-63NW]; Michael Smith & Jonathan Levin, *Florida Lawmaker Proposes Abortion Ban That Mimics Texas SB-8 Law*, TIME (Sept. 22, 2021, 11:24 PM), https://time.com/6100983/florida-abortion-bill-texas-sb8/ [https://perma.cc/A245-LDT8].

<sup>9</sup> See Kate Zernike, *Oklahoma Legislature Passes 6-Week Abortion Ban Modeled On Texas Law*, N.Y. TIMES (Apr. 28, 2022), https://www.nytimes.com/2022/04/28/us/oklahoma-abortion-legislature.html [https://perma.cc/M7D6-DY8K]; Vimal Patel, *Idaho Supreme Court Halts 6-Week Abortion Ban Based On Texas' Law*, N.Y. TIMES (Apr. 8, 2022), https://www.nytimes.com/2022/04/08/us/idaho-supreme-court-abortion.html [https://perma.cc/6JBZ-ZW9C]; cf. Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657 (2021) (documenting a growing conservative embrace of private enforcement laws).

<sup>10</sup> Alan M. Dershowitz, *How to Mess with Texas' Anti-Abortion Bounty? Apply It to Gun Sales*, HILL (Sept. 10, 2021, 3:16 PM), https://thehill.com/opinion/judiciary/571732-how-to-mess-with-texas-anti-abortion-bounty-apply-it-to-gun-sales [https://perma.cc/AX22-T5JN]; see also Lawrence Hurley, *Texas Abortion Law Opens Door to Copycat Curbs on Guns, Other Rights*, REUTERS (Dec. 15, 2021, 12:41 PM), https://www.reuters.com/world/us/texas-abortion-law-opens-door-copycat-curbs-guns-other-rights-2021-12-15/ [https://perma.cc/968E-LNXW]; Gavin Newsom, *The Supreme Court Opened the Door to Legal Vigilantism in Texas. California Will Use the Same Tool to Save Lives*, WASH. POST (Dec. 20, 2021, 4:55 PM), https://www.washingtonpost.com/opinions/2021/12/20/newsomcalifornia-ghost-guns-vigilante-justice/ [https://perma.cc/Q78M-LBQ7]; Off. of the Cal. Governor (@CAGovernor), TWITTER (Dec. 11, 2021, 9:01 PM), https://twitter.com/CAGovernor/status/1469865007517089798 [https://perma.cc/QH43-S4U7]; Brief of Legal Scholars as Amici Curiae in Support of Petitioners at 21, *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021) (No. 21-463) [hereinafter *Whole Woman's Health Scholars Brief*].

dire warnings of such copycat laws,<sup>11</sup> and Justice Brett Kavanaugh likewise raised this hypothetical in oral arguments.<sup>12</sup> The Firearms Policy Coalition noted that similar laws could be passed targeting “people facilitating same-sex marriage,” “*declining* to facilitate such weddings,” “facilitating interracial marriage,” or “refusing to be vaccinated or wear a mask.”<sup>13</sup> Indeed, states have already started passing laws enabling individuals to file suit against schools that teach “critical race theory” or refuse to exclude transgender students from bathrooms or athletics.<sup>14</sup>

Worries about the profusion of similar laws stem not just from S.B. 8’s effective nullification of the right to an abortion, but also its “unprecedented” enforcement mechanism.<sup>15</sup> A journalist for the *Texas Tribune* wrote of the law’s “huge, unprecedented expansion of who can bring a lawsuit against someone else,” quoting lawyers and law professors describing its citizen-suit provision as “radical” and “way out there.”<sup>16</sup> “Typically, in tort law, which is used to compensate people who have been injured, a person must have incurred some sort of personal harm in order to sue someone else,” noted the

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<sup>11</sup> Brief of Firearms Policy Coalition as Amicus Curiae in Support of Granting Certiorari at 9–13, *Whole Woman’s Health*, 141 S. Ct. 2494 (No. 21-463) [hereinafter *Whole Woman’s Health Firearms Brief*].

<sup>12</sup> Transcript of Oral Argument at 73, *Whole Woman’s Health*, 141 S. Ct. 2494 (No. 21-463), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/21-463\\_8758.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-463_8758.pdf) [<https://perma.cc/CSF5-JV94>] (Justice Kavanaugh asking about a law permitting private suits against “everyone who sells an AR-15”).

<sup>13</sup> *Whole Woman’s Health Firearms Brief*, *supra* note 11, at 11; *see also* Matt Ford, *Texas’s Abortion Bounty Law Is Inspiring Republican Lawmakers Around the Country*, NEW REPUBLIC (Mar. 11, 2022), <https://newrepublic.com/article/165710/texas-bounty-law-abortion-desantis> [<https://perma.cc/T27A-J8NH>] (describing Missouri’s copycat law); Kimberly Kindy & Alice Crites, *The Texas Abortion Ban Created a ‘Vigilante’ Loophole. Both Parties Are Rushing to Take Advantage*, WASH. POST (Feb. 22, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/02/22/texas-abortion-law-vigilante-loophole-supreme-court/> [<https://perma.cc/R354-V3WL>] (providing examples of copycat laws states could enforce).

<sup>14</sup> Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 12–18), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3915944](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944) [<https://perma.cc/ZV5N-9EQN>]; Brooke Migdon, *Oklahoma Lawmaker Introduces Book-Banning Bill with \$10,000-a-Day Penalty*, HILL (Dec. 28, 2021), <https://thehill.com/changing-america/respect/diversity-inclusion/587517-oklahoma-lawmaker-introduces-book-banning-bill> [<https://perma.cc/5NCY-H3J4>].

<sup>15</sup> *See* Alexander J. Lindvall, *Texas, Abortion, and State Action*, 74 SMU L. REV. F. 139, 140 (2021) (“[W]hat makes this Texas law ‘unprecedented’ is its enforcement mechanism.”).

<sup>16</sup> Erin Douglas, *Texas Abortion Law a “Radical Expansion” of Who Can Sue Whom, and an About-Face for Republicans on Civil Lawsuits*, TEX. TRIB. (Sept. 3, 2021, 5:00 AM), <https://www.texastribune.org/2021/09/03/texas-republican-abortion-civil-lawsuits/> [<https://perma.cc/2LH7-5TVF>].

*Tribune*.<sup>17</sup> “Texas’ new abortion law, however, gives that privilege to anyone.”<sup>18</sup>

Other legal scholars have labeled as unprecedented the fact that S.B. 8 enables “suit from *any* person in *any* judicial district in Texas,”<sup>19</sup> denies defendants certain well-recognized affirmative defenses, and “threatens defendants with plaintiff’s attorney’s fees and costs.”<sup>20</sup> Dissenting from the Supreme Court’s denial of preliminary injunctive relief and vacatur of a stay of the district court proceedings, Chief Justice Roberts called the law “unprecedented,” as it “essentially delegated enforcement of [its] prohibition to the populace at large,”<sup>21</sup> while Justice Kagan decried the law’s “wholly unprecedented enforcement scheme.”<sup>22</sup> Justice Sotomayor objected in particular to the legislature’s “extraordinary” deputization of “the State’s citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors’ medical procedures.”<sup>23</sup> A month later, a federal district judge in Texas issued a fiery order temporarily halting enforcement of the law, likewise finding it “unprecedented” because “[t]he State created a private cause of action by which individuals with no personal interest in, or connection to, a person seeking an abortion would be incentivized to use the state’s judicial system, judges, and court officials to interfere with the right to an abortion.”<sup>24</sup>

In fact, the only truly unprecedented aspect of S.B. 8 is that it *entirely* displaces public enforcement with private enforcement. Virtually every other part of its enforcement scheme—the deputization of uninjured private citizens, the broad venue provision, the creation of civil “bounties,” the disallowance of certain defenses, and the provision for plaintiffs’ fees and costs—enjoys ample precedent. Beginning in the nineteenth century and continuing throughout the twentieth, state legislatures across the country passed hundreds of laws enabling *any* private citizen, regardless of personal injury or interest, to bring suit to remedy a range of supposed social ills—

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; see also Matt Ford, *The Supreme Court Gives the Green Light to More Texas-Style Bounty Laws*, NEW REPUBLIC (Dec. 10, 2021), <https://newrepublic.com/article/164689/sb8-gorsuch-texas-abortion-bounty> [<https://perma.cc/9N5U-E8WT>] (“There are obvious differences between [common state law claims cited by Justice Gorsuch] and S.B. 8. Perhaps most obviously, they require the plaintiffs to show some kind of injury before bringing a lawsuit, which S.B. 8 does not.”).

<sup>19</sup> Whole Woman’s Health Scholars Brief, *supra* note 10, at 3.

<sup>20</sup> *Id.* at 7.

<sup>21</sup> Whole Woman’s Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

<sup>22</sup> *Id.* at 2500 (Kagan, J., dissenting).

<sup>23</sup> *Id.* at 2498 (Sotomayor, J., dissenting); see also United States v. Texas, 142 S. Ct. 14, 15 (2021) (Sotomayor, J., dissenting) (again mentioning enforcement by “bounty hunters”).

<sup>24</sup> United States v. Texas, 566 F. Supp. 3d 605, 620 (W.D. Tex. Oct. 6, 2021), *rev’d*, 2021 U.S. App. LEXIS 30317 (5th Cir. Oct. 8, 2021).

from the sale of liquor to the sale of sex, from air and water pollution to the unlicensed practice of dentistry. Although these laws differed considerably, their hallmark was their empowerment of uninjured individuals to bypass state authorities and directly use the machinery of the courts to remedy something the legislature considered a harm to the public at large. S.B. 8 is best understood as the latest of these laws, albeit taken to a new extreme in its foreclosure of any public enforcement.

Drawing deeply on original archival research, this Article provides the first comprehensive history of these laws, which I call “moral nuisance abatement statutes.”<sup>25</sup> The authors of these statutes took inspiration from the common law of public nuisance, and as such these statutes are united by the same underlying logic. A public nuisance, according to the *Restatement*, is “an unreasonable interference with a right common to the general public.”<sup>26</sup> Yet to bring such a public nuisance action for damages or an injunction, a private plaintiff traditionally must have “suffered harm of a kind different from that suffered by other members of the public.”<sup>27</sup> This is the so-called “special injury” requirement—and it is what moral nuisance abatement statutes excise. Although citizen-suit provisions are common in state and federal statutes, moral nuisance abatement statutes go further than any other private enforcement schemes. These statutes often dispense *completely* with the demand of injury and also shift burdens of proof, foreclose common defenses, and provide financial incentives for plaintiffs—all in the name of more effectively attacking a supposed cancer on the commons.

To recount the history of these statutes, this Article focuses on two of the most widespread: red-light abatement statutes and pollution abatement statutes. Red-light abatement statutes, passed by almost every state in the early twentieth century, enabled any private citizen to bring suit to force the closure of brothels, or “bawdy houses.” These statutes derived their name from so-called red-light districts—areas of cities in which sex was sold openly, with the implicit or explicit tolerance of the police.<sup>28</sup> Pollution abatement statutes, passed by a dozen states in the 1970s, empowered any private citizen to bring suit to halt any environmental harm. Some red-light and pollution abatement statutes eliminated certain legal defenses; some

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<sup>25</sup> Some states have laws called “moral nuisance” statutes, but these do not allow uninjured individuals to bring suit. *See, e.g.*, Moral Nuisances—Action for Injunction and Abatement, IDAHO CODE tit. 52, ch. 4. Such statutes are not the subject of this Article.

<sup>26</sup> RESTATEMENT (SECOND) OF TORTS § 821B(1). Note that the *Third Restatement of Torts* has not redefined public nuisance.

<sup>27</sup> *Id.* § 821C(1).

<sup>28</sup> “By 1900, nearly every large American city, and many smaller ones, too, possessed a recognized and well-known red-light district where prostitution flourished.” Neil Larry Shumsky, *Tacit Acceptance: Respectable Americans and Segregated Prostitution, 1870–1910*, 19 J. SOC. HIST. 665, 665 (1986).

even created bounties. In the face of lawsuits seeking to declare these statutes unconstitutional, courts broadly upheld them. Indeed, the majority of red-light *and* pollution abatement statutes remain on the books to this day.

The creation of these laws marked a significant point of divergence from the burgeoning federal doctrine of standing that, remarkably, happened largely under the scholarly radar. To repeat, these statutes do not require *any* injury to the plaintiff; under federal standing doctrine—as embodied in *Lujan*,<sup>29</sup> *Spokeo*,<sup>30</sup> and *TransUnion*<sup>31</sup>—moral nuisance abatement statutes would thus be unconstitutional, for without injury there is no live “case or controversy.” But because they are state laws, they have been repeatedly upheld by state courts applying state tests for standing.

I borrow the term “moral nuisance” from the late conservative legal scholar John Copeland Nagle, who defined it as “an offense to a claimant’s moral sensibilities.”<sup>32</sup> Although he appears to have been largely unaware of the history of moral nuisance abatement statutes, Nagle wrote that private actions against moral nuisances “can be the appropriate legal response to injuries that governmental officials are unwilling or unable to address.”<sup>33</sup> I disagree vehemently with Nagle’s characterization of “Drug Dealing, Prostitution, and Other Urban Blights” as moral nuisances, but I agree with his proposition: “Moral nuisance claims, in other words, can perform the same function as citizen suits used to respond to air and water pollution under federal environmental laws.”<sup>34</sup> After all, the climate crisis and the collective action problem it poses are just the kind of looming issue that the government has, as yet, proven unable to adequately address. What are actions by environmentalists against pollution—against climate catastrophe—if not blows against immorality?<sup>35</sup> A moral nuisance is inherently in the eye of the beholder.<sup>36</sup>

Instead of moral nuisance abatement statutes, several legal scholars have proposed alternative terms or frameworks when considering S.B. 8 and

<sup>29</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

<sup>30</sup> *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016).

<sup>31</sup> *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021).

<sup>32</sup> John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 276 (2001). Nagle laid out a more detailed five-factor definition. *Id.* at 268–69.

<sup>33</sup> *Id.* at 268.

<sup>34</sup> *Id.* at 268, 316.

<sup>35</sup> See Andreas Malm, *The Moral Case for Destroying Fossil Fuel Infrastructure*, GUARDIAN (Nov. 18, 2021, 6:10 AM), <https://www.theguardian.com/commentisfree/2021/nov/18/moral-case-destroying-fossil-fuel-infrastructure> [https://perma.cc/65QT-GURP].

<sup>36</sup> See Kindy & Crites, *supra* note 13 (quoting S.B. 8 author Jonathan Mitchell as “believ[ing] other Texas-style laws will be most effective on ‘culture war issues’ such as enforcement of marijuana and abortion laws”).

its copycats. Professors Jon Michaels and David Noll suggest calling these statutes “rights suppressing laws,” because “they empower aggrieved parties, who typically have suffered nothing more than offended sensibilities, to wield the power of the state to suppress the rights of disfavored or marginalized individuals and groups (or their allies).”<sup>37</sup> Professor Aziz Huq draws on history to place S.B. 8 within a long chronology of “private suppression”—that is, using law to “realize the brute fact of caste.”<sup>38</sup> Professor Lauren Moxley Beatty locates S.B. 8 in the history of “state nullification”—that is, states attempting to nullify federal rights.<sup>39</sup> And Professor Luke Norris deeply theorizes private enforcement, drawing a distinction between “traditional private enforcement suits” and “recent adaptations.”<sup>40</sup> All of these accounts are significant and meritorious, yet I argue that without a consideration of nuisance abatement in general—and moral nuisance abatement statutes in particular—they provide an incomplete account of S.B. 8 and similar laws.

Vanishingly few legal scholars have written about the statutes discussed herein; few even seem aware of their existence. No less august an expert than Professor William L. Prosser wrote in 1942 that statutes “which authorize a suit by any private citizen to enjoin the continuance of certain designated public nuisances such as bawdy-houses and gaming resorts, without proof of any damage whatever to himself,” were “rather uncommon” outside of Texas.<sup>41</sup> At the time, red-light abatement statutes existed in roughly forty other states. Only two scholarly works have substantively discussed red-light abatement statutes since the early twentieth century: a doctoral dissertation from 1984 and a law review article from 2004.<sup>42</sup> And while pollution abatement statutes were widely discussed in the early 1970s, few scholars

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<sup>37</sup> Michaels & Noll, *supra* note 14 (manuscript at 4).

<sup>38</sup> Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 6), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4072800](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4072800) [<https://perma.cc/9LA4-6PG4>]. He also argues that the “most forceful parallel” to S.B. 8 is the European witch trials of the sixteenth and seventeenth centuries. *Id.* at 6–7.

<sup>39</sup> Lauren Moxley Beatty, *The Resurrection of State Nullification—and the Degradation of Constitutional Supremacy: SB8 and the Blueprint for State Copycat Laws*, 111 GEO. L.J. ONLINE 18, 18 (2022).

<sup>40</sup> Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. (forthcoming 2022) (manuscript at 5–6), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4112342](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4112342) [<https://perma.cc/7EMP-NTAZ>].

<sup>41</sup> William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 413 (1942).

<sup>42</sup> See Thomas C. Mackey, *Red Lights Out: A Legal History of Prostitution, Disorderly Houses, and Vice Districts, 1870-1917* (May 1984) (Ph.D. dissertation, Rice University), <https://scholarship.rice.edu/bitstream/handle/1911/19051/8416540.PDF> [<https://perma.cc/YYH5-9TWB>]; Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 YALE J.L. & HUMANS. 123 (2004).

have considered them in the last four decades.<sup>43</sup> While many scholars have written about private enforcement schemes more broadly, virtually none has focused on these laws in particular.<sup>44</sup> As such, many of these works lack the context moral nuisance abatement statutes can provide.

Situating S.B. 8 and similar contemporary laws within the history of moral nuisance abatement statutes is vital because it allows us to draw numerous connections among these statutes, better understand their origins—and thereby predict much about their future. As this Article shows, red-light abatement statutes, pollution abatement statutes, and S.B. 8—the first of what might be called “abortion abatement statutes”—all emerged from strikingly similar beginnings; all were motivated by a strident skepticism of public enforcement; all spread in very similar ways; and all expressly tried to achieve ends that activists had long sought through other political channels. History reveals that all moral nuisance abatement statutes have been most successful as *threats*—not by actually engendering an avalanche of citizen suits—and all did indeed inspire numerous copycats. Interestingly, in spite of these laws’ emergence out of their champions’ extreme fears of agency capture, moral nuisance abatement statutes have almost invariably ended up bolstering and expanding the power of the administrative state. Finally, the earlier moral nuisance abatement statutes also provide some clues for ways to blunt the impact of S.B. 8 and its progeny.

The history of public nuisance is likewise far more instructive for understanding these statutes than the ahistorical framing that some scholars have adopted, labeling S.B. 8 an embodiment of “Trumpist politics.”<sup>45</sup> The concept of public nuisance is inherently capacious and ill-defined—indeed, eminent legal scholars have referred to it as a “wilderness,”<sup>46</sup> “immersed in

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<sup>43</sup> See Joseph Frank DiMento, *Administrative Agency Response to Innovative Environmental Legislation 2* (1974) (Ph.D. dissertation, University of Michigan) (on file with author) (referring to Michigan’s “now famous” law and its progeny); Joseph F. DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 1977 DUKE L.J. 409, 443–47 (calling for more research into these laws). *But see* Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 FORDHAM ENV’T L. REV. 21, 88–97 (2018) (briefly surveying these statutes); Susan George, William J. Snape III & Rina Rodriguez, *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 U. BALT. J. ENV’T L. 1 (1997) (same).

<sup>44</sup> See Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

<sup>45</sup> Michaels & Noll, *supra* note 14 (manuscript at 21). Indeed, even in the realm of abortion, scholars have been decrying private enforcement of abortion restrictions since well before Trump. *See generally* Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123 (2007).

<sup>46</sup> 1 H.G. WOOD, *THE LAW OF NUISANCES*, at iii (1875).

undefined uncertainty,”<sup>47</sup> and a “garbage can.”<sup>48</sup> This vagueness can make nuisance actions a source of significant illiberal danger. In the nineteenth century, a white resident of Kansas unsuccessfully sought to have a court declare his Black neighbors to be a nuisance.<sup>49</sup> A few decades later, a court did declare premarital cohabitation to be a public nuisance.<sup>50</sup> Notably, a group of property owners recently sought an injunction and civil damages from an abortion provider, arguing that the abortion clinic was a nuisance,<sup>51</sup> and commentators have warned that anti-choice judges could construe some abortions themselves as a form of nuisance.<sup>52</sup> Yet this vagueness can also be used to achieve progressive ends. For instance, various localities have declared Confederate monuments to be public nuisances and removed these monuments as a result.<sup>53</sup> And as the scholar Leslie Kendrick has recently argued, public nuisance “provided the architecture that impelled the tobacco industry to historic settlements of \$246 billion with all 50 states” and “provides the template for the structure of opioid litigation.”<sup>54</sup>

This flexibility in the use of public nuisance gestures at a core truth of moral nuisance abatement statutes—and one that may inspire many detractors: they are not an inherently wicked model. Similar to nationwide injunctions, moral nuisance abatement statutes strike me as a powerful but neutral tool.<sup>55</sup> I see moral nuisance abatement statutes as harmful when that which they seek to restrict or annihilate is something I believe to be good; I see them as beneficial when that which they seek to restrict or annihilate is something I believe to be bad. The substance of a law, not its enforcement mechanism, determines the vast bulk of its normative value. I use the vague terms “good” and “bad” in large part to underscore the subjectivity inherent in using the law to instantiate an ethical code. As one conservative writer recently told a journalist, “All law is imbued with moral character. . . . Let’s stop pretending otherwise, and just acknowledge which morals we’re trying

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<sup>47</sup> F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949).

<sup>48</sup> Prosser, *supra* note 41, at 410.

<sup>49</sup> Falloon v. Schilling, 29 Kan. 292, 297 (1883).

<sup>50</sup> Adams v. Commonwealth, 171 S.W. 1006, 1007 (Ky. 1915).

<sup>51</sup> McBryer v. Governors Ridge Office Park Ass’n, 860 S.E.2d 58, 60 (Ga. Ct. App. 2021).

<sup>52</sup> Hope Silberstein, *Taking On TRAP Laws: Protecting Abortion Rights Through Property Rights*, 2017 U. CHI. LEGAL F. 737, 748 n.64 (2018).

<sup>53</sup> See Emily Behzadi, *Statues of Fraud: Confederate Monuments as Public Nuisances*, 18 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2022).

<sup>54</sup> Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. (forthcoming 2023) (manuscript at 3–4), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4130444](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130444) [<https://perma.cc/WTF3-LCLA>].

<sup>55</sup> See Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 62 (2017) (“Context matters.”).

to legislate.”<sup>56</sup> Thus, I consider red-light abatement statutes unethical because I see them as targeting marginalized people and restricting what should be a lawful vocation. I consider pollution abatement statutes to be ethical because I see them as targeting environmental depredation, something that actually does deserve condemnation and elimination. I think S.B. 8 is a vile law simply because it seeks to restrict access to abortion, not because it does so through private rights of action.

Consider two state laws. In 2016, California voters were presented with a ballot proposition that would have enabled any individual in the state to bring suit seeking a civil penalty against any adult film “producer” (including, apparently, self-producers) who failed to use condoms in penetrative scenes.<sup>57</sup> Opponents decried this “‘bounty hunter’ clause,”<sup>58</sup> and voters narrowly rejected the proposition.<sup>59</sup> Yet, as some pointed out, decades ago, California voters approved a proposition that, to this day, enables any person to bring an action seeking an injunction or a civil penalty against any person that knowingly exposed others to carcinogenic or toxic chemicals.<sup>60</sup> This citizen-suit provision does not require a special injury, although it demands the private enforcer give the state notice (and cede to the state priority in bringing such an action).<sup>61</sup> In spite of these limitations (many of which were also included in the rejected condom proposition), opponents of this private right of action also decry its private enforcers as “bounty hunters.”<sup>62</sup> Like a majority of California voters, I support the latter ballot proposition and oppose the former, yet it would be disingenuous for me to suggest that the *enforcement mechanism* of the former is the source of my opposition; rather, it is the *subject* and *targets* of the enforcement.

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<sup>56</sup> Sam Adler-Bell, *The Radical Young Intellectuals Who Want to Take Over the American Right*, NEW REPUBLIC (Dec. 2, 2021), <https://newrepublic.com/article/164408/young-intellectuals-illiberal-revolution-conservatism> [<https://perma.cc/KEM9-4CNZ>] (quoting writer Declan Leary).

<sup>57</sup> CAL. SEC’Y OF STATE, TEXT OF PROPOSED LAWS: PROPOSITION 60 §§ 3(b), 4.1(d), at 149 (2016), <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop60> [<https://perma.cc/XD9X-CW3C>].

<sup>58</sup> Rachel Becker, *One Man Wants to Turn Every Porn Watcher in California into a Condom Vigilante*, VERGE (Nov. 7, 2016), [theverge.com/2016/11/7/13552110/california-prop-60-porn-safe-sex-condom-adult-film-performer](http://theverge.com/2016/11/7/13552110/california-prop-60-porn-safe-sex-condom-adult-film-performer) [<https://perma.cc/C26D-K8MM>].

<sup>59</sup> Matt Baume, *California’s Prop 60 Failed but Condoms in Porn Is Hardly a Dead Issue*, SLATE (Jan. 5, 2017, 1:39 PM), <https://slate.com/human-interest/2017/01/californias-prop-60-condoms-in-porn-bill-failed-but-the-fight-continues.html> [<https://perma.cc/B94M-FXGJ>].

<sup>60</sup> Becker, *supra* note 58; CAL. HEALTH & SAFETY CODE § 25249.7(d).

<sup>61</sup> *Id.*

<sup>62</sup> See Stacy Papadopoulos, *California’s Proposition 65 Unfair to Food and Beverage Processors*, FOOD PROCESSING (Aug. 31, 2021), <https://www.foodprocessing.com/articles/2021/proposition-65-unfair-to-processors/> [<https://perma.cc/7BJA-QHQP>]; Richard C. Paddock, *New Breed of Bounty Hunter to Hit Polluters*, L.A. TIMES (Feb. 14, 1988, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1988-02-14-mn-42659-story.html> [<https://perma.cc/VDV5-J4FA>].

The point of this Article is not to minimize the real ways that S.B. 8 departs from earlier moral nuisance abatement statutes. Rather, I aim to identify these statutes as belonging to a common class; to clarify their history; and to analyze their spread, impact, similarities, differences, and significance.

## I. ENACTMENT

Nearly all moral nuisance abatement statutes share a common origin story: a single charismatic individual comes up with an idea, writes a draft bill based on it, and promotes it widely. For red-light abatement statutes, the charismatic creator was a reformer in Iowa named John Brown Hammond. For pollution abatement statutes, the originator was a law professor named Joseph Sax. For S.B. 8, it was an erstwhile academic and conservative activist named Jonathan Mitchell.<sup>63</sup> And, in an ominous harbinger of the possible future of S.B. 8, the origin stories proceed according to a predictable narrative. First, activist enthusiasm about an issue permeates the country. Next, a statute is proposed that marries the activists' moral zeal with the legal structure of nuisance law. Then, the moral nuisance abatement statute spreads rapidly from its site of creation, quickly passing in states and cities across the country—often via model laws. Although they quickly fall out of common use, these statutes nonetheless have an immense impact on communities nationwide, and they remain good law in many states.

This Part tracks first the enactment and spread of red-light abatement laws and then the similar trajectory of pollution abatement laws. To tell this story, however, we must begin with the history of public nuisance—tracing, in particular, the ways these laws expanded on the common law doctrine, motivated by their champions' skepticism of the government's ability to abate public nuisances. According to Professor Peter Hennigan—who wrote one of the few articles chronicling this history—red-light abatement acts “represented a staggering transfer of heretofore public powers to private organizations and private citizens. Private groups and citizens now had powers coterminous with law-enforcement officials.”<sup>64</sup> Hennigan argued that red-light abatement laws further “articulated a communitarian vision in

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<sup>63</sup> See, e.g., Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021, 5:51 PM), <https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html> [<https://perma.cc/2NQ8-Z7MZ>]; Jessica Gresko & Paul J. Weber, *Origin Story of the Texas Law That Could Upend Roe v. Wade*, ASSOCIATED PRESS (Sept. 4, 2021), <https://apnews.com/article/texas-us-supreme-court-laws-185e383ba4aa6cfc558231dcabd4104a> [<https://perma.cc/4TAJ-HS8P>]. Mitchell had originally floated some of the ideas reflected in S.B. 8 in a 2018 law review article. See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 946–47 (2018).

<sup>64</sup> Hennigan, *supra* note 42, at 177.

which the line separating public and private interests vanished.”<sup>65</sup> He concluded that the role of such a tool in contemporary America “remains an open question,” but the tool was undoubtedly a “potent” and potentially transformative one.<sup>66</sup> These words, written in 2004, are unsettling to read in view of S.B. 8 and its conservative copycats. Yet the broader history of moral nuisance abatement statutes also gestures at a tool that could be potent for those *opposed* to the conservative agenda as well.

Several of the other recent scholarly interventions seeking to historicize S.B. 8 and similar laws have tracked the long history of private enforcement regimes, including the Fugitive Slave Acts,<sup>67</sup> False Claims Act,<sup>68</sup> and other statutes allowing private individuals to bring *qui tam* actions against their neighbors.<sup>69</sup> These pieces are doing vital work, and it is clear that the private enforcement schemes of yesterday have laid the groundwork for S.B. 8 and its progeny. This Article seeks to show that these recent statutes also have a line of predecessors in public nuisance law, and they therefore belong to a distinct class of laws: moral nuisance abatement statutes.

#### A. *Enactment of Red-Light Abatement Laws*

##### 1. *A Brief History of Brothels as Nuisance*

Before the early sixteenth century, the line separating public and private nuisances was rigid: individuals could bring private nuisance actions in courts of equity, while only the state could prosecute a public nuisance suit (which was heard in a criminal court by a jury).<sup>70</sup> In 1536, however, one man sued another for blocking a highway, leading a Judge Fitzherbert to write that only the state could bring a suit for public nuisance—“unless it be where one man has greater hurt or inconvenience than any other man had, and then he who had more displeasure or hurt, etc., can have an action to recover his damages that he had by reason of this special hurt.”<sup>71</sup> From this case emerged the “special injury” rule—that is, an individual can sue another for public

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<sup>65</sup> *Id.* at 198.

<sup>66</sup> *Id.*

<sup>67</sup> Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462 (repealed 1864); Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (amended 1850).

<sup>68</sup> False Claims Act, ch. 67, 12 Stat. 696 (1863) (codified as amended at 31 U.S.C. §§ 3729–3733).

<sup>69</sup> Michaels & Noll, *supra* note 14 (manuscript pt. I.A); Huq, *supra* note 38 (manuscript pt. I); Norris, *supra* note 40 (manuscript pt. I.A).

<sup>70</sup> 1 WOOD, *supra* note 46, § 14; 2 H.G. WOOD, *THE LAW OF NUISANCES* §§ 674, 732–34 (1883); see also Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 *CAMBRIDGE L.J.* 144, 157 (1978); P.H. Winfield, *Nuisance as a Tort*, 4 *CAMBRIDGE L.J.* 189, 189–92 (1931). For more on these ancient writs, see William A. McRae Jr., *Development of Nuisance in the Early Common Law*, 1 *U. FLA. L. REV.* 27, 29–35 (1948).

<sup>71</sup> Newark, *supra* note 47, at 483 (quoting Y.B. 27 Hen. VIII, Mich. pl. 10 (1536)).

nuisance so long as the plaintiff has suffered damage “of a different character, special, and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured.”<sup>72</sup>

At least as early as the seventeenth century, commentators consistently characterized houses of prostitution as nuisances. The esteemed jurist Edward Coke wrote in 1628 that “although adultery and fornication be punished by the ecclesiastical law, yet the keeping of a house of bawdrie . . . or brothel-house, being as it were a common nuisance, is punishable by the common law.”<sup>73</sup> Other English legal eminences agreed, including William Blackstone, who wrote, “All disorderly Inns, or ale-houses, gaming houses, bawdy houses, stage-plays, unlicensed booths, and stages for rope-dancers, mountebanks, and the like, are public nuisances, and may upon indictment be suppressed and fined.”<sup>74</sup> American jurists imported such ideas into the law of the early republic.<sup>75</sup>

Notably, neither Coke nor Blackstone nor most of their followers envisioned private individuals using the courts to suppress bawdy houses, nuisances though they thought they were. At common law, individuals typically could not remedy “moral offenses such as gambling and violations of Sunday laws” through public nuisance actions, because public nuisance only covered injuries to property, not injuries to persons.<sup>76</sup> Further, only those who resided adjacent to houses of prostitution could bring a nuisance action against them, because only they could plausibly have suffered the requisite “special damage” (apparently due to the noise, impact on property values, etc.).<sup>77</sup> But during the nineteenth century, these traditional rules began to erode.<sup>78</sup> Equity courts began granting injunctive relief for injuries

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<sup>72</sup> 2 WOOD, *supra* note 70, § 646; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71 (1st ed. 1941); 8 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 424–25 (2d ed. 1938).

<sup>73</sup> Mackey, *supra* note 42, at 70 (citing EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 205 (1628)).

<sup>74</sup> *Id.* at 74 (citing 5 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 167 (1803)).

<sup>75</sup> *Id.* at 74–85 (citing the writings of Nathan Dane, Joel Prentiss Bishop, and Horace Wood); William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966).

<sup>76</sup> Hennigan, *supra* note 42, at 132.

<sup>77</sup> *See, e.g.,* Crawford v. Tyrrell, 28 N.E. 514, 515 (N.Y. 1891) (holding that plaintiffs were entitled to relief because their neighbors’ home was being used for prostitution, which “rendered uncomfortable” the plaintiffs’ home and left plaintiffs “annoyed and seriously disturbed” from the resulting noise and indecent exposure).

<sup>78</sup> *See* Mackey, *supra* note 42, at 134 (“[D]espite the legal treatise writers’ disapproval of private nuisance actions, persons sought equitable relief more and more as the nineteenth century ended, and the courts, if not the doctrinal writings, allowed the actions to stand.”). For a detailed analysis of nuisance actions against brothels/bawdy houses in the nineteenth century, see *id.* ch. 4.

to persons,<sup>79</sup> and some judges even started to argue that private individuals should be able to maintain public nuisance actions without having shown a “special injury.”<sup>80</sup>

In the midst of this doctrinal confusion, various interest groups began strategically pushing state legislatures to declare certain “social evils” to be public nuisances. By the 1880s, state courts had clarified that such statutory declarations of nuisance were proper and constitutional,<sup>81</sup> and in 1887 the Supreme Court held the same.<sup>82</sup> Armed with this endorsement, interest groups pushed for ever broader definitions of public nuisance, and by 1918<sup>83</sup> statutorily-declared nuisances included noxious weeds,<sup>84</sup> diseased plants,<sup>85</sup> moored house boats,<sup>86</sup> willow trees planted along the highway<sup>87</sup>—and, significantly for our purposes, saloons,<sup>88</sup> gambling,<sup>89</sup> opium smoking,<sup>90</sup> and publishing obscene books.<sup>91</sup>

As part of this legislative push, temperance advocates persuaded a small number of state legislatures to pass “liquor abatement laws,” declaring sites where liquor was sold to be public nuisances.<sup>92</sup> As Peter Hennigan has noted, these statutes generally included “a provision allowing *any* citizen of the county (or state) to maintain a bill for an injunction.”<sup>93</sup> Those whose buildings were targeted for closure under these laws quickly challenged their

<sup>79</sup> This was part of a broader expansion in the provision of injunctive relief. *See, e.g.*, *In re Debs*, 158 U.S. 564, 570 (1895) (describing an injunction to protect railroad companies); Joseph M. Sullivan, *Novel Uses of the Writ of Injunction*, 64 ALBANY L.J. 46 (1902).

<sup>80</sup> Hennigan, *supra* note 42, at 134–36; *see also* Seymour D. Thompson, *Injunction Against Criminal Acts*, 18 AM. L. REV. 599, 605–07 (1884); G.R. Eldridge, *Abatement of Nuisances*, 19 CENT. L.J. 42, 43 (1884).

<sup>81</sup> Hennigan, *supra* note 42, at 137. As examples, Hennigan cites *State v. Hughes*, 16 A. 911, 912–13 (R.I. 1889)); *Streeter v. People*, 69 Ill. 595, 599–600 (1873); *Commonwealth v. Howe*, 13 Gray 26, 30 (Mass. 1859); *Zumhoff v. State*, 4 Greene 526, 526–30 (Iowa 1854); and *Our House v. State*, 4 Greene 172, 176–77 (Iowa 1853).

<sup>82</sup> *Mugler v. Kansas*, 123 U.S. 623, 669 (1887).

<sup>83</sup> The following were collected in Note, *Statutory Declarations of Public Nuisance*, 18 COLUM. L. REV. 346, 347 n.2 (1918).

<sup>84</sup> 1909 N.D. Laws 334.

<sup>85</sup> N.M. STAT. ANN. § 2730 (1915).

<sup>86</sup> 1909 Cal. Stat. 140.

<sup>87</sup> 121 ILL. COMP. STAT. § 131 (1913).

<sup>88</sup> *See* 1917 Utah Laws 715.

<sup>89</sup> MASS. GEN. LAWS ch. 101 § 12 (1901).

<sup>90</sup> 1913 N.D. Laws 1451.

<sup>91</sup> HAW. REV. STAT. § 4129 (1915).

<sup>92</sup> Hennigan, *supra* note 42, at 138–39. Hennigan notes that, in 1892, eight states had passed these laws: Maine, Massachusetts, New Hampshire, Rhode Island, West Virginia, Ohio, Iowa, and Kansas. *Id.* at 139 n.85; *see also* Wm. Church Osborn, *Liquor Statutes in the United States*, 2 HARV. L. REV. 125 (1888–1889) (surveying state statutes restricting the sale and manufacture of liquor as of 1889).

<sup>93</sup> Hennigan, *supra* note 42, at 139 (emphasis added).

constitutionality, arguing (among other objections) that such statutes “violated the special injury rule by permitting those not directly affected by the nuisance to bring a public nuisance complaint.”<sup>94</sup> In what may have been the first state supreme court decision on a liquor abatement law, the Kansas Supreme Court described the case as a “novel proceeding—so novel as to startle old and experienced practitioners” and upheld that state’s law on narrow grounds.<sup>95</sup> But the Iowa Supreme Court easily upheld a similar law in what was to become the “watershed case.”<sup>96</sup> Hennigan credits the rise of an elected judiciary more responsive to public opinion as “a partial explanation for the acceptance of the Liquor Abatement laws by state courts.”<sup>97</sup> Notably, it was in Iowa that the red-light abatement laws would emerge a generation later.

## 2. *Passage of Red-Light Laws*

Although the red-light abatement laws arose within the context of alcohol abatement activism, they were specifically the brainchild of an almost fanatically committed temperance advocate named John Brown Hammond.<sup>98</sup> Claiming descent from the legendary abolitionist with whom he shared his first and middle names, the Iowa-based Hammond approached his avocation with a similar zeal.<sup>99</sup> After working as a coal miner for twenty years, he first achieved fame for using a chair to wreck a speakeasy, and his notoriety spread following many on-the-ground investigations into bootlegging.<sup>100</sup> By middle age, recorded one newspaper, he had become “known throughout the Middle West as the temperance detective, and in this capacity he has probably prosecuted more illegal liquor sellers and sat more days in the witness chair than any other man living.”<sup>101</sup>

Yet as he traveled across Iowa, attempting to enforce the state’s liquor abatement law, Hammond found “open houses of vice” and red-light districts

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 139–41 (quoting *State ex rel. Vance v. Crawford*, 28 Kan. 726, 729 (1882)).

<sup>96</sup> *Id.* at 141 (citing *Littleton v. Fritz*, 22 N.W. 641, 644 (Iowa 1885)).

<sup>97</sup> *Id.* at 144 (citing Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L.J. 333, 374–75 (2000)).

<sup>98</sup> See *Purity Workers Here*, HOUS. POST, Oct. 23, 1910, at 13 (“He is in it because he can’t help it. He has a natural and innate hatred of the saloon and the brothel that amount[s] almost to a fury.”).

<sup>99</sup> See *Hammond, Liquor Foe, Dies*, DES MOINES REG., July 21, 1940, at 9.

<sup>100</sup> *Hammond—He Would Stable the Brewer’s Big Horses*, DES MOINES REG., June 26, 1933, at 9; *Hammond Appeals Case*, DES MOINES REG., Nov. 7, 1906, at 3; *Centreville Man Prefers Charges*, DES MOINES REG., Sept. 7, 1905, at 6.

<sup>101</sup> *Purity Workers Here*, *supra* note 98, at 13.

“openly maintained, and protected by officials sworn to enforce the law.”<sup>102</sup> As he later reflected, these travels convinced him of the necessity of “applying the injunction and abatement law provided for liquor nuisances[] to this evil.”<sup>103</sup>

So Hammond promptly drafted a bill, the stage already set by the activist fervor of his contemporaries in the temperance movement. And with fervent backing from the Women’s Christian Temperance Union (WCTU), the Iowa legislature passed the bill in 1909.<sup>104</sup> The new law declared “any building, erection, ground, or place used for the purpose of lewdness, assignation, or prostitution” to be a nuisance, and it empowered “any citizen of the county” to bring an abatement action against such a nuisance.<sup>105</sup> The citizen could seek a temporary injunction, enjoining the property’s owner from continuing its operation, and then a permanent injunction, enjoining the building’s use for up to a year.<sup>106</sup> The bulk of the law’s substance was borrowed from existing nuisance law. It was the citizen-suit provision that one of the laws’ promoters described as “new and distinctive.”<sup>107</sup> Supporters and skeptics alike called the law “drastic.”<sup>108</sup>

Although new and arguably drastic, the law reflected increasing anxiety surrounding public vice (such as prostitution and promiscuity), as well as frustration with the inability of traditional nuisance doctrine to remedy such visible forms of vice. Notably, at this time, many activists had begun to decry prostitution—particularly brothel prostitution, and red-light districts more broadly—as a “pernicious” threat to safety, order, and morality.<sup>109</sup> In spite of

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<sup>102</sup> John B. Hammond, *Injunction and Abatement Law We Need*, LIGHT, July–August 1924, at 8. There is evidence, however, that Iowa officials were already attempting to shutter some red-light districts. See *An Interesting Experiment*, DES MOINES REG., Sept. 22, 1908, at 4.

<sup>103</sup> Hammond, *supra* note 102, at 8. The state senator who introduced the bill into the Iowa legislature later disputed Hammond’s account, claiming he had authored the bill. *Cosson’s Secretary Sure that He Wrote the Bill*, DES MOINES TRIB., Feb. 12, 1927, at 11. Contrary to nearly every account of the red-light abatement laws, Hammond was not a state legislator.

<sup>104</sup> *Will Ask For Change in Law*, DES MOINES TRIB., Jan. 9, 1909, at 2; Iowa Code § 99 (originally 1909 Iowa Acts ch. 214).

<sup>105</sup> Bascom Johnson, *The Injunction and Abatement Law*, 1 SOC. HYGIENE 231, 232–33 (1915) (quoting 1909 Iowa Acts 196).

<sup>106</sup> *Id.* at 231, 232–33.

<sup>107</sup> *Id.* at 231.

<sup>108</sup> See J. Lionberger Davis, *Argument in Support of the Injunction and Abatement Bill 8* (Feb. 3, 1915) (transcript available at the University of Minnesota, American Social Hygiene Association Records (ASHAR), in folder 14, box 210) (“The bill is drastic because the situation calls for a strong measure to meet the conditions which exist.”); John B. Hammond, *The Iowa “Red Light” Injunction Law and Its Success*, in THE GREAT WAR ON WHITE SLAVERY, OR FIGHTING FOR THE PROTECTION OF OUR GIRLS 358 (Clifford G. Roe & B.S. Steadwell eds., 1911); *Red Light Houses of City Are Doomed*, DAILY TIMES, Apr. 15, 1909, at 12.

<sup>109</sup> Hennigan, *supra* note 42, at 162.

this redefinition, however, common law public nuisance actions against bawdy houses were failing, largely because of the special injury requirement.<sup>110</sup> “It was often peculiarly difficult to prove such injury,” noted one activist.<sup>111</sup> The red-light abatement acts remedied this by eliminating the special injury rule and empowering *any* citizen to bring an abatement action.<sup>112</sup> This also mitigated reformers’ frustrations with public officials who were perceived to be beholden to “the interests of commercialized vice.”<sup>113</sup> By allowing citizens to bypass the authorities, the law furnished them with “a powerful weapon of self-protection,” commented two advocates.<sup>114</sup> In sum, the historian Thomas Mackey wrote, “the red light abatement acts turned the common law rules upside down.”<sup>115</sup>

Using Iowa’s law as a model,<sup>116</sup> reformers carried the red-light abatement act throughout the Midwest<sup>117</sup>—Nebraska<sup>118</sup> and North Dakota<sup>119</sup> quickly passed versions—and then all across the country.<sup>120</sup> First and foremost among these reformers was Hammond; indeed, after succeeding in Iowa, he spent the next several years essentially on the road, crisscrossing the country to urge the passage of red-light abatement laws.<sup>121</sup> The bills’ other champions were similarly zealous reformers who hated brothels and bawdyhouses, considered them “nuisances,” and “demanded for themselves

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<sup>110</sup> *Id.* at 164–66.

<sup>111</sup> Johnson, *supra* note 105, at 231.

<sup>112</sup> Mackey, *supra* note 42, at 88–89.

<sup>113</sup> Hennigan, *supra* note 42, at 173 (quoting one letter from the Committee of Fifteen to the Mayor of Chicago).

<sup>114</sup> BASCOM JOHNSON & GEORGE WORTHINGTON, INJUNCTION AND ABATEMENT LAWS OF IOWA AND NEBRASKA 3 (1914) (on file with University of Minnesota, ASHAR, in folder 1, box 211).

<sup>115</sup> Mackey, *supra* note 42, at 88; *cf.* Whole Woman’s Health Scholars Brief, *supra* note 10, at 3 (“S.B. 8 is a private enforcement scheme flipped on its head.”).

<sup>116</sup> See *Résumé of Legislation Upon Matters Relating to Social Hygiene Considered by the Various States During 1914*, 1 SOC. HYGIENE 1, 93 (1914) (noting the passage of many laws based on the Iowa red-light abatement act).

<sup>117</sup> Hennigan, *supra* note 42, at 167–68.

<sup>118</sup> NEB. REV. STAT. §§ 8775–8784 (1913).

<sup>119</sup> 1913 N.D. Laws 2238–40.

<sup>120</sup> See AM. SOC. HYGIENE ASS’N, THE SEGREGATION OF PROSTITUTION AND THE INJUNCTION AND ABATEMENT LAW AGAINST HOUSES OF PROSTITUTION, at i (1916) (on file with University of Minnesota, ASHAR, in folder 4, box 170) (listing citations for these laws). For a timeline on the passage of the first several bills, see SHREVEPORT VICE COMM’N, SOME REASONS WHY WE WANT THE INJUNCTION AND ABATEMENT ACT INTRODUCED AND MADE LAW AT THE NEXT SESSION OF THE GENERAL ASSEMBLY (1916) (on file with University of Minnesota, ASHAR, in folder 1, box 211).

<sup>121</sup> Hammond, *supra* note 108, at 358; Hammond, *Liquor Foe, Dies*, *supra* note 99, at 9; Hammond—*He Would Stable the Brewer’s Big Horses*, *supra* note 100, at 9; *Churches Asked to Aid Purity Session*, INDIANAPOLIS STAR, May 4, 1912, at 5; *Purity Workers Here*, *supra* note 98, at 13.

a new remedy based on this new conception of the interest of individual citizens in the public welfare.”<sup>122</sup>

Private reformers led the fight for the passage (and, eventually, enforcement) of a red-light abatement act in California—home to perhaps the most sexually permissive city in the country, San Francisco, which boasted not one, but two infamous red-light districts.<sup>123</sup> Notably, in California, the campaign to pass the bill was largely spearheaded by elite white women.<sup>124</sup> In the early 1910s, female activists across California were in the midst of a fight to pass a state suffrage amendment,<sup>125</sup> and groups such as the WCTU—eager to flex their political muscle—branched out to promote the bill.<sup>126</sup> On January 16, 1913, State Senator Edwin Grant of San Francisco, one of the WCTU’s allies, reintroduced the Red-Light Abatement Act.<sup>127</sup> Women’s groups and social purity activists lobbied for all they were worth, pushing sympathizers to send legislators thousands of telegrams; WCTU lecturers alone spoke in twenty-three counties.<sup>128</sup> That March, following seven hours of debate, the California legislature passed the bill, and scores of women rushed the senate floor in celebration.<sup>129</sup> The governor signed the Act into law in April and presented the pen to the president of the WCTU.<sup>130</sup>

Across the rest of the country, the leading private organization that was promoting the passage of similar laws was the American Social Hygiene

<sup>122</sup> Johnson, *supra* note 105, at 232.

<sup>123</sup> See JOSH SIDES, *EROTIC CITY: SEXUAL REVOLUTIONS AND THE MAKING OF MODERN SAN FRANCISCO* 6 (2009); Neil Larry Shumsky & Larry M. Springer, *San Francisco’s Zone of Prostitution, 1880-1934*, 7 J. HIST. GEOGRAPHY 71, 73–79 (1981).

<sup>124</sup> Teresa Hurley & Jarrod Harrison, “Awed by the Women’s Clubs”: *Women Voters and Moral Reform, 1913–1914*, in CALIFORNIA WOMEN AND POLITICS: FROM THE GOLD RUSH TO THE GREAT DEPRESSION 241, 346 (Robert W. Cherny, Mary Ann Irwin & Ann Marie Wilson eds., 2011); Franklin Hichborn, *The Anti-Vice Movement in California: I. Suppression*, 6 SOC. HYGIENE 213, 213–14 (1920); *California Women and the Vice Situation*, SURVEY, May 1913, at 162–63 (“The campaign on behalf of the measure was . . . necessarily a woman’s movement.”).

<sup>125</sup> See *Country Vote Did It*, RIVERSIDE DAILY PRESS, Oct. 14, 1911, at 2.

<sup>126</sup> Hiroyuki Matsubara, *Unsettled Controversies: The Anti-Prostitution Movement and the Transformation of American Political Culture, 1910-1919*, at 175–76, 212–13 (2005) (Ph.D. dissertation, University of California, Santa Cruz) (ProQuest); Nancy Moore Rockafellar, *Making the World Safe for the Soldiers of Democracy: Patriotism, Public Health and Venereal Disease Control on the West Coast, 1910-1919*, at 125–26 (1990) (Ph.D. dissertation, University of Washington) (on file with author); Hurley & Harrison, *supra* note 124, at 255.

<sup>127</sup> Hurley & Harrison, *supra* note 124, at 242–43; Hichborn, *supra* note 124, at 217. According to activists, an earlier bill had been defeated by men “closely connected with the exploitation of the social evil.” Franklin Hichborn, *California’s Fight for a Red Light Abatement Law*, 1 SOC. HYGIENE 6, 7 (1914).

<sup>128</sup> FRANKLIN HICHBORN, *STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1913*, at 327–28 (1913); Hichborn, *supra* note 127, at 7–8; Hurley & Harrison, *supra* note 124, at 242–43; *California Women and the Vice Situation*, *supra* note 124, at 163; Rockafellar, *supra* note 126, at 126.

<sup>129</sup> Hurley & Harrison, *supra* note 124, at 246–47.

<sup>130</sup> *Id.* at 247.

Association (ASHA). Emerging out of the 1913 merger of a group of religious antiprostitution activists and a group of physicians hoping to eliminate venereal disease,<sup>131</sup> the ASHA would quickly come to provide the political and investigative muscle behind the red-light abatement acts. From its earliest days, the ASHA lobbied state governments to pass these laws.<sup>132</sup> In the mid-1910s, the ASHA (drawing on the work of predecessor reform organizations) created a “model law”—including a red-light abatement provision—which they promoted throughout the nation.<sup>133</sup> “By generating a model law,” commented Hennigan, “the ASHA saved state legislatures from the laborious task of creating the law from scratch.”<sup>134</sup> ASHA officials then worked closely with state legislators to ensure the passage of the strongest statutes possible.<sup>135</sup> Largely because of the efforts of Hammond, the ASHA, and other reformers,<sup>136</sup> by 1915, eighteen states had passed red-light abatement acts.<sup>137</sup> By 1920, that number had climbed to thirty-eight or forty-two, depending on which report one believed.<sup>138</sup> By 1952, the number had apparently settled at forty-one.<sup>139</sup>

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<sup>131</sup> See SCOTT WASSERMAN STERN, *THE TRIALS OF NINA MCCALL: SEX, SURVEILLANCE, AND THE DECADES-LONG GOVERNMENT PLACE TO IMPRISON “PROMISCUOUS” WOMEN* 30–31 (2018). For a general history of the ASHA, see Kayla Jo Blackman, *Public Power, Private Matters: The American Social Hygiene Association and the Policing of Sexual Health in the Progressive Era* (2014) (M.A. thesis, University of Montana), <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=5318&context=etd> [<https://perma.cc/93RL-VUC9>].

<sup>132</sup> Minutes of the Meeting of the Executive Committee of the American Social Hygiene Association (Jan. 8, 1914) (on file with University of Minnesota, ASHAR, in folder 2, box 5); see also Blackman, *supra* note 131, at 34 (describing the “wide network of communication” ASHA wielded); Letter from Bascom Johnson, Dir., Dep’t of L. Enf’t Activities, Am. Soc. Hygiene Ass’n, to G.S. Cole, Ketchikan Power Co. 1 (July 6, 1920) (on file with University of Minnesota, ASHAR, in folder 14, box 210) (describing successful upholding of these laws in multiple state courts).

<sup>133</sup> See STANDARD FORM OF INJUNCTION AND ABATEMENT ACT (AM. SOC. HYGIENE ASS’N 1915) (on file with University of Minnesota, ASHAR, in folder 4, box 171); Hennigan, *supra* note 42, at 182; Blackman, *supra* note 131, at 99; Johnson, *supra* note 105, at 233–39.

<sup>134</sup> Hennigan, *supra* note 42, at 183.

<sup>135</sup> *Id.* at 184–85; Blackman, *supra* note 131, at 63.

<sup>136</sup> Hennigan notes that during World War I, the federal “Commission on Training Camp Activities (CTCA), which comprised prominent members of ASHA, took it upon itself to harmonize state prostitution laws,” including red-light abatement laws. Hennigan, *supra* note 42, at 185.

<sup>137</sup> Johnson, *supra* note 105, at 231.

<sup>138</sup> Compare *Current Legislation*, 20 COLUM. L. REV. 605, 605 & n.1 (1920) (reporting thirty-eight states), with Letter from George E. Worthington, Assoc. Dir., Dep’t of L. Enf’t Activities, Am. Soc. Hygiene Ass’n, to G.S. Cole, Ketchikan Power Co. 1 (Mar. 3, 1920) (on file with University of Minnesota, ASHAR, in folder 14, box 210) [hereinafter Letter from George E. Worthington to G.S. Cole] (reporting forty-two states).

<sup>139</sup> Bascom Johnson, *Good Laws . . . Good Tools: Injunctions and Abatements Versus Houses of Prostitution*, 38 J. SOC. HYGIENE 204, 207 (1952). Quebec also passed a version. See An Act Respecting the Owners of Houses Used as Disorderly Houses, ch. 81, 10 Geo. V (1920); Letter from George E. Worthington, Assoc. Dir., Dep’t of L. Enf’t Activities, Am. Soc. Hygiene Ass’n, to W.D. Riley, State Bd. of Health 1–2 (Feb. 10, 1921) (on file with University of Minnesota, ASHAR, in folder 14, box 210).

The acts were broadly similar, with the initiator of the abatement action having to first serve defendant-owners with “notice that the property is being conducted contrary to law and that court action will be instituted unless the nuisance is abated within a reasonable period.”<sup>140</sup> The plaintiff would then file a complaint in the name of the state, supported by affidavits from witnesses.<sup>141</sup> “On the strength of these affidavits the court generally [would] issue a temporary injunction restraining the defendants from continuing the nuisance.”<sup>142</sup> This would be followed by a hearing—after which, if the plaintiff could establish the existence of a nuisance, the judge would enter an order of abatement, shuttering the building and requiring the removal or sale of all chattels therein.<sup>143</sup> The building would then generally remain closed for a year, unless its owner successfully petitioned the court, filed a bond, and swore to operate it “in a lawful manner.”<sup>144</sup>

Nonetheless, wording from statute to statute did vary somewhat, as did some of the substantive provisions.<sup>145</sup> As Mackey noted, “a few states provided for a three-hundred-dollar tax to be levied against the building, ground, owners, and agents of the building after the issuance of the permanent injunction.”<sup>146</sup> Seven states’ laws empowered any citizen of the state (rather than any citizen of the county “in which the nuisance exist[ed]”) to bring an abatement action.<sup>147</sup> In nineteen states, where the existence of a house of prostitution was established in a criminal proceeding, the authorities were *required* to institute abatement actions against that property.<sup>148</sup> Some laws also altered the rules of evidence or standards of proof: in Colorado, for example, while “[o]rdinarily the fact that a house is [a brothel] cannot be proven by its general reputation alone,” the red-light abatement act “provides that evidence of the general reputation of the place, or of its habitués, shall

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<sup>140</sup> Letter from George R. Worthington, Acting Dir., Dep’t of Legal Measures, Am. Soc. Hygiene Ass’n, to Alice L. Weeks, Sec’y, Women’s Joint Legislative Comm. of R.I. 1 (Oct. 13, 1923) (on file with University of Minnesota, ASHAR, in folder 14, box 210) [hereinafter Letter from George R. Worthington to Alice L. Weeks]; see Memorandum of Alex L. O’Grady, Assistant Dist. Att’y, City & Cnty. of S.F., The Red Light Abatement Law 1–2 (on file with University of Minnesota, ASHAR, in folder 3, box 11).

<sup>141</sup> Letter from George R. Worthington to Alice L. Weeks, *supra* note 140, at 1.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1–2.

<sup>144</sup> *Id.* at 2. For another explanation of how the laws work, see Memorandum from the Am. Soc. Hygiene Ass’n, Facts About the Redlight Abatement Act (on file with University of Minnesota, ASHAR, in folder 15, box 210).

<sup>145</sup> Mackey, *supra* note 42, at 91.

<sup>146</sup> *Id.* In Nebraska, this \$300 tax was struck down. See *State ex rel. English v. Fanning*, 147 N.W. 215, 217 (Neb. 1914).

<sup>147</sup> Johnson, *supra* note 139, at 207 (Maryland, Missouri, New Mexico, Rhode Island, South Carolina, Texas, Virginia).

<sup>148</sup> *Id.*; see also Johnson, *supra* note 105, at 233.

be admissible for the purpose of proving the keeping of such a place on the premises.”<sup>149</sup> These differences notwithstanding, the hallmark of these statutes was the ability of plaintiffs to bring suit, regardless of whether they were personally injured.

## B. Enactment of Pollution Abatement Laws

### 1. A Brief History of Pollution as Nuisance

The history of nuisance suits—and public nuisance suits in particular—is inextricably linked with the attempted abatement of pollution. Indeed, some of the earliest recorded nuisance suits involved private individuals suing their neighbors for polluting their water or land or air.<sup>150</sup> These included “such offenses as . . . smoke from a lime-pit and diversion of water from a stream.”<sup>151</sup> In 1611, a man named William Allred famously claimed that a hog sty near his house had “corrupted” and “infected” the air.<sup>152</sup> Pollution soon became the quintessential public nuisance<sup>153</sup>—although, as one scholar aptly noted, “[u]sually those persons most seriously affected by such polluters as the factories of England’s infamous black belt—the workers and poor classes—were in no position to seek any remedy.”<sup>154</sup>

Perhaps just as many Progressive reformers worried about the nuisance of pollution as about the alleged nuisance of prostitution, and their reforms “led to a gradually increasing willingness by government and the courts to control public dangers such as air pollution. Public nuisances became more clearly defined and tests were written into ordinances outlawing particular emissions, usually smoke.”<sup>155</sup> At the same time that numerous states were passing red-light abatement acts, the Alaska legislature declared water pollution to be a public nuisance, while Massachusetts and Missouri did the same for the emission of dense smoke.<sup>156</sup> Courts rarely troubled such declarations, leading one commentator in 1918 to argue that “the category of

<sup>149</sup> *Gregg v. People*, 176 P. 483, 485 (Colo. 1918).

<sup>150</sup> *See, e.g.*, Benedict A. Schuck III, *Air Pollution as a Private Nuisance*, 3 NAT. RES. L. 475, 481–82 (1970) (tracing the development of private-nuisance suits based on air pollution); Newark, *supra* note 47, at 482 n.18 (describing an early English nuisance suit alleging interference with land).

<sup>151</sup> Prosser, *supra* note 41, at 411.

<sup>152</sup> Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L.Q. 755, 770 n.49 (2001) (citing *William Alfred’s Case*, 77 Eng. Rep. 816 (K.B. 1611)).

<sup>153</sup> R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1 (1960).

<sup>154</sup> William C. Porter, Comment, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107, 107 (1968).

<sup>155</sup> *Id.* at 108.

<sup>156</sup> 1913 Alaska Sess. Laws ch. 81, § 160; MASS. GEN. LAWS ch. 102, § 122 (1902); 1915 Mo. Laws 364.

nuisance may be broadened indefinitely.”<sup>157</sup> This did, however, lead to the oft-noted nuisance creep, aided by the vagueness inherent to the concept.<sup>158</sup> Prosser famously compiled a “colorful list” of absurd-sounding public nuisances, including “obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law.”<sup>159</sup> A generation earlier, he had noted that nuisances included “anything from an alarming advertisement to a cockroach baked in a pie.”<sup>160</sup> From the beginning, nuisances were in the eye of the beholder.

Nonetheless, by the mid-twentieth century, many forms of pollution constituted well-recognized nuisances,<sup>161</sup> and in 1972, the Supreme Court established the federal common law of public nuisance in cases of air and water pollution.<sup>162</sup> Legal scholars and law students were championing the law of nuisance as a potential weapon in the arsenal of environmentalists.<sup>163</sup> But rapidly evolving technology was also rendering the problem of pollution “too large and complex for the case by case approach of traditional public nuisance abatement procedures.”<sup>164</sup> Immense industrial complexes, the proliferation of the automobile, and the trickiness of cumulative emissions

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<sup>157</sup> *Statutory Declarations of Public Nuisance*, *supra* note 83, at 349.

<sup>158</sup> See Antolini, *supra* note 152, at 769–70; see also Newark, *supra* note 47, at 480 (“[T]he subject as commonly taught comprises a mass of material which proves so intractable to definition and analysis that it immediately betrays its mongrel origins.”).

<sup>159</sup> Prosser, *supra* note 75, at 998 (quoting Newark, *supra* note 47, at 482); Antolini, *supra* note 152, at 770.

<sup>160</sup> Prosser, *supra* note 41, at 410.

<sup>161</sup> See, e.g., Schuck, *supra* note 150, at 477, 484; Prosser, *supra* note 41, at 411–12.

<sup>162</sup> *Illinois v. City of Milwaukee*, 406 U.S. 91, 103–08 (1972); see also Craig E.R. Jakubowicz, Comment, *Federal Common Law of Public Nuisance: An Expanding Approach to Water Pollution Control*, 10 U. BALT. L. REV. 134, 135 (1980) (analyzing lower courts’ handling of the cause of action the Court created in *City of Milwaukee*).

<sup>163</sup> See, e.g., John P.S. McLaren, *The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?*, 10 OSGOOD HALL L.J. 505 (1972) (examining the potential of common-law nuisance actions for addressing environmental problems); John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1971) (reviewing the *Second Restatement of Torts*’s position on public nuisance and discussing the use of public nuisance actions in environmental litigation); Leonard A. Miller & Doyle J. Borchers, *Private Lawsuits and Air Pollution Control*, 56 A.B.A. J. 465 (1970) (advocating for supplementing private actions with government regulation); Charles Matthew Berger, Comment, *Air Pollution as a Private Nuisance*, 24 WASH. & LEE L. REV. 314 (1967) (discussing various approaches to the private nuisance action for air pollution); Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE L.J. 102 (1969) (arguing that the ineffectiveness of federal legislation may prompt the use of private actions to address water pollution).

<sup>164</sup> Porter, *supra* note 154, at 108; see also Paul Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere*, 33 BROOK. L. REV. 17, 25 (1966) (describing the difficulty in categorizing pollution-related nuisance cases due to the complexities involved).

demanded a statutory fix.<sup>165</sup> Further, the special injury hindrance remained.<sup>166</sup> And American courts were reluctant to stymie the nation's mid-century industrial progress; famously, in 1970 in *Boomer v. Atlantic Cement Co.*, a New York court refused to enjoin the air pollution emanating from a cement plant, holding that an injunction would do greater harm to the community at large than the nuisance did.<sup>167</sup> It was the perceived inadequacies of public nuisance actions, as much as their long history of use, that would lead to the creation of innovative—and, to some, dangerous—abatement acts in the 1970s.

## 2. *Passage of Pollution Laws*

On January 28, 1969, an environmental activist named Joan Wolfe sent a letter to Professor Joseph Sax, a young law professor at the University of Michigan, asking him if he could design “some kind of appropriate legislation which would give the citizen much greater rights to a livable environment.”<sup>168</sup> Wolfe wrote that she wanted the law to have teeth, specifically mentioning “the right to sue,” and added that she envisioned this law being “a model for the country, and we feel strongly that it may well be our only hope for a livable environment.”<sup>169</sup> With remarkable speed, this letter led to the passage of a pollution abatement law in Michigan, and then copycat laws across the country. An examination of the surviving archival records reveals that these statutes, though less explicitly based on public nuisance, were nonetheless enormously influenced by the logic of nuisance, as well as the tremendous energy enjoyed by the environmental movement at this particular historical moment. *Something* had to be done to prevent

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<sup>165</sup> Porter, *supra* note 154, at 108; Comment, *Air Pollution, Nuisance Law, and Private Litigation*, 1971 UTAH L. REV. 142, 145; Julian Conrad Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1154; *see also* Antolini, *supra* note 152, at 828–29; Schuck, *supra* note 150, at 485, 489–90 (discussing the failed attempt at reforming tort law to address the pollution issue). Writing on a related matter in 1968, William C. Porter concluded, “[T]he use of a private nuisance action is a strictly limited weapon in the anti-air pollution arsenal, as the normal elements of any tort action must be alleged and proven—causation, injury and damage.” Porter, *supra* note 154, at 113.

<sup>166</sup> Frank P. Grad & Laurie R. Rockett, *Environmental Litigation—Where the Action Is?*, 10 NAT. RES. J. 742, 743 (1970); Note, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734, 740 (1970); Boyd D. Taylor, *Control of Stream Pollution*, 33 TEX. L. REV. 370, 374 (1955).

<sup>167</sup> 257 N.E.2d 870, 873 (N.Y. 1970). *But see* Christine Rosen, *Differing Perceptions of the Value of Pollution Abatement Across Time and Place: Balancing Doctrine in Pollution Nuisance Law, 1840–1906*, 11 LAW & HIST. REV. 303, 304 (1993) (noting that “nineteenth-century judges [hearing nuisance suits] did not think about cost and benefit as modern economists would”).

<sup>168</sup> Letter from Joan Wolfe, Chairman, W. Mich. Env’t Action Council, to Joseph Sax, Professor, Univ. of Mich. L. Sch. 1 (Jan. 28, 1969) (on file with University of Michigan, Joseph Sax Papers (JSP), in folder 2, box 1) [hereinafter Letter from Joan Wolfe].

<sup>169</sup> *Id.* at 2.

pollution, activists felt. That something, it turned out, was enabling private individuals to use the machinery of the state to, they hoped, save the world.

Though they came to environmentalism from different backgrounds, Wolfe and Sax shared an interest in novel approaches. Wolfe, who lived in western Michigan, had long been frustrated by what she perceived to be the lack of impact by traditional conservation groups. So she had begun experimenting with more confrontational forms of advocacy: in 1966, she had coordinated Michigan's "First Environmental Teach-In," which drew over 500 participants,<sup>170</sup> and in 1968, she had cofounded the West Michigan Environmental Action Council (WMEAC).<sup>171</sup> Sax, meanwhile, had developed an interest in environmentalism while teaching at the University of Colorado.<sup>172</sup> In 1965, he moved to Michigan, where his iconoclastic streak started to become apparent, exemplified by a 1967 article asserting that "slumlordism" might be a tort because it "causes severe emotional distress to another."<sup>173</sup> That same year, Sax and several activists that would later join WMEAC were involved in a lawsuit.<sup>174</sup> The Environmental Defense Fund sued Michigan on behalf of "all the people of the United States," seeking to enjoin the state's use of pesticides on the grounds that it violated the Fifth, Ninth, and Fourteenth Amendments.<sup>175</sup> Shortly after this suit was dismissed, the WMEAC board of directors voted

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<sup>170</sup> Posting of Joan Wolfe, Michigan's First Environmental Teach-In (Oct. 1966) (on file with University of Michigan, Joan Wolfe Papers (JWP)); Tom La Belle, *Public Seminar to Spotlight Hazards: Experts Scan Man's Poisoning of Globe*, GRAND RAPIDS PRESS, Oct. 12, 1966, at 17 (on file with University of Michigan, JWP); Daniel Schoonmaker, *A History of Environmental Action*, RAPID GROWTH (Dec. 4, 2008), <https://www.rapidgrowthmedia.com/features/wmeac112008.aspx> [<https://perma.cc/6PD3-6N5C>].

<sup>171</sup> Joan Wolfe, *The Formation of the West Michigan Environmental Action Council* (unpublished manuscript) (on file with University of Michigan, JWP). WMEAC was created during an era of increasing environmental litigiousness. Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 LAW & HIST. REV. 965, 991-93 (2015); JONATHAN H. ADLER, ENVIRONMENTALISM AT THE CROSSROADS 42-48 (1995).

<sup>172</sup> Douglas Martin, *Joseph Sax, Who Pioneered Environmental Law, Dies at 78*, N.Y. TIMES (Mar. 10, 2014), <https://www.nytimes.com/2014/03/11/us/joseph-l-sax-who-pioneered-legal-protections-for-natural-resources-dies-at-78.html> [<https://perma.cc/DG66-XYA5>].

<sup>173</sup> Joseph Sax & Fred Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 875 (1967).

<sup>174</sup> *Env't Def. Fund, Inc. v. Ball*, 162 N.W.2d 164 (Mich. Ct. App. 1968). On Sax's involvement, see CHARLES F. WURSTER, DDT WARS: RESCUING OUR NATIONAL BIRD, PREVENTING CANCER, AND CREATING THE ENVIRONMENTAL DEFENSE FUND 35 (2015), and Joseph Sax, Hearing Before Michigan Court of Appeals (Nov. 13, 1967) (transcript available at Stony Brook University Environmental Defense Fund Records (EDFR), folder 7, box 1, series 1, subgroup V, record group 2) (arguing in court on behalf of the Environmental Defense Fund). On other activists' involvement, see Roger L. Conner, Note, *Michigan Environmental Protection Act*, 4 MICH. J.L. REFORM 358, 360 (1971), noting that WMEAC "members had participated in the 1967 case against the Agriculture Department."

<sup>175</sup> Complaint at 3, *Env't Def. Fund*, 162 N.W.2d 164 (on file with Stony Brook University, EDFR, in folder 12, box 38, subgroup IV, record group 1).

unanimously to devote \$1,000 toward research on “developing a model ‘law for the environment.’”<sup>176</sup>

Sax soon agreed to draft this model law,<sup>177</sup> and over the course of a week in February he wrote the “Natural Resource Conservation and Environmental Protection Act of 1969.”<sup>178</sup> According to the text of the bill, any citizen could bring an action

for declaratory and equitable relief in the name of the state against any person, including a government instrumentality or agency, for the protection of the air, water and other natural resources of the state from pollution, impairment or destruction, or for the protection of the public trust in the natural resources of the state.<sup>179</sup>

To bring such a suit, a citizen had to make a *prima facie* showing that the defendant’s conduct had polluted or was “reasonably likely to pollute, impair or destroy” natural resources.<sup>180</sup> This language relates back to the common law elements of public nuisance, which require interference with a right common to the general public. Sax’s bill, reflecting Wolfe’s letter, asserted a common environmental right in the general public.

Significantly, however, the citizen did not have to demonstrate any injury to herself or her property.<sup>181</sup> Further, once a citizen-plaintiff made a *prima facie* showing of pollution, the burden of proof would promptly shift to the alleged polluters to show either that they were not polluting or that there was no feasible alternative to their conduct. These polluters’ compliance with existing environmental laws or regulations would not constitute an absolute defense; rather, judges would be empowered to scrutinize the existing environmental laws and regulations—if they were found to be insufficiently protective, the judges would be required to throw them out and put in place new, more protective standards instead.<sup>182</sup>

In this respect, Sax’s bill built upon the model of the red-light abatement acts passed decades earlier. Both empowered uninjured citizens to sue their neighbors, seeking to enjoin conduct that was proscribed by the text of the

<sup>176</sup> Letter from Joan Wolfe, *supra* note 168, at 1.

<sup>177</sup> Letter from Joseph Sax, Professor, Univ. of Mich. L. Sch., to Joan Wolfe, Chairman, W. Mich. Env’t Action Council 1 (Feb. 4, 1969) (on file with University of Michigan, JSP, in folder 2, box 1).

<sup>178</sup> See Tally of Sax’s Labor and Expenses (on file with University of Michigan, JSP, in folder 2, box 1).

<sup>179</sup> H.B. 3055, 1969 Leg., Reg. Sess. § 2 (Mich. 1969) (on file with University of Michigan, JSP, in folder 17, box 1).

<sup>180</sup> *Id.*

<sup>181</sup> Memorandum from Joseph Sax, Professor, Univ. of Mich. L. Sch. 3 (Feb. 1969) (on file with University of Michigan, WMEAC Records (WMEACR), in box 13).

<sup>182</sup> *Id.*

same law that created the enforcement mechanism. And both emerged from the conviction that certain conduct was so injurious to the social fabric as to constitute a harm common to the public at large, but not injurious enough to any particular person as to inarguably cause the special injury necessary for a private citizen's public nuisance suit.

Notably, the precise moment when Sax wrote this law coincided not just with increased calls for creative uses of nuisance actions but also with an increased skepticism as to the ability of nuisance law to address modern problems.<sup>183</sup> When, in the early 1970s, a Florida court dismissed (on standing grounds) a public nuisance action by a conservation group seeking to enjoin a private corporation from developing on sand beaches,<sup>184</sup> a Florida law student wrote a law review comment urging the elimination of the special injury rule altogether.<sup>185</sup> In 1970, a group of young lawyers, many concerned with the environment and moved by Sax's own work, nearly led a revolt at the Annual Meeting of the American Law Institute, seeking to liberalize public nuisance by reforming, or even jettisoning, the special injury rule.<sup>186</sup> Sax himself wrote around this time that public nuisance law was unlikely to be terribly helpful to environmentalists, as it was "encrusted with the rule that permits lawsuits to be initiated only by the state attorney general, and not by private citizens."<sup>187</sup> (Tellingly, he added, "It also has an unfortunate historical association with abatement of brothels, gambling dens, and similar institutions, and the case law is therefore not easily transferable to natural resource problems."<sup>188</sup>) Thus, Sax's law should best be understood as both a response to calls to use the law (including nuisance law) in innovative ways *and* a burgeoning reckoning with the inadequacies of public nuisance doctrine.

Thomas Anderson, the state legislator who had agreed to champion Sax's bill, initially delayed introducing it, worried that it would "languish[] forever in committee,"<sup>189</sup> but the delay ultimately proved to be fortunate: the legislature began to debate the bill just as the entire country was consumed with environmental fever (equivalent, perhaps, to the Progressive

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<sup>183</sup> See J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 331 (1967).

<sup>184</sup> *Save Sand Key, Inc. v. U.S. Steel Corp.*, 281 So. 2d 572, 573 (Fla. Ct. App. 1973).

<sup>185</sup> Tim E. Sleeth, Comment, *Public Nuisance: Standing to Sue Without Showing "Special Injury,"* 26 U. FLA. L. REV. 360, 366 (1974).

<sup>186</sup> Antolini, *supra* note 152, at 836–39.

<sup>187</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485 n.45 (1970).

<sup>188</sup> *Id.*

<sup>189</sup> Letter from Thomas J. Anderson, Mich. State House Representative, to W. Mich. Env't Action Council 1 (July 2, 1970) (on file with University of Michigan, WMEACR, in box 13).

antiprostitution movement) amidst the planning for the first Earth Day.<sup>190</sup> The bill's introduction also coincided perfectly with a fierce United Auto Workers union campaign for what would now be called environmental justice,<sup>191</sup> and the UAW threw its considerable political muscle behind the bill.<sup>192</sup> Wolfe and other WMEAC activists, for their part, blanketed the state with flyers and letters and packed legislative hearings with hundreds of partisans.<sup>193</sup> And Sax provided the bill's scholarly bona fides.

Testifying before the state legislature, Sax analogized the bill's citizen-suit provision to public nuisance statutes in an attempt to portray it as not terribly threatening:

The idea of citizens suing to protect the public interest is not a novelty at all. Michigan itself has long permitted citizens to sue "in the name of the State of Michigan" on behalf of the public to enjoin certain kinds of public nuisances like houses of prostitution and gambling dens. The principle of the public suit is well established and it might be asked whether the principle might not more needfully be applied to the conservation of our resources than to prostitutes and gamblers.

Indeed, such suits are permitted to be brought to enjoin a wide range of improper conduct in many states. At least a dozen states have statutes like ours, and Wisconsin and Florida permit private citizens to sue on behalf of the public to enjoin public nuisances—itsself a rather broad concept—generally.<sup>194</sup>

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<sup>190</sup> ADAM ROME, *THE GENIUS OF EARTH DAY: HOW A 1970 TEACH-IN UNEXPECTEDLY MADE THE FIRST GREEN GENERATION*, at x, 4–5 (2013).

<sup>191</sup> Josiah Rector, *Accumulating Risk: Environmental Justice and the History of Capitalism in Detroit, 1880-2015*, at 17, 164–86 (2017) (Ph.D. dissertation, Wayne State University), [https://digitalcommons.wayne.edu/oa\\_dissertations/1738/](https://digitalcommons.wayne.edu/oa_dissertations/1738/) [<https://perma.cc/ZL8X-9RMU>]; UNITED AUTO WORKERS, *RESOLUTION ON COLLECTIVE BARGAINING IN 1970* (1970) (on file with Wayne State University, United Auto Workers Records (UAWR), in folder 11, box 5).

<sup>192</sup> Joan Wolfe, "History" of the Michigan Environmental Protection Act of 1970, at 3 (Aug. 10, 1970) (unpublished manuscript) (on file with University of Michigan, JSP); Minutes as Recorded by Kathleen Cramer, UAW Legislative Office 1 (Mar. 4, 1970) (on file with Wayne State University, UAWR, in folder 26, box 5); Statement Prepared for Hearing on House Bill #3055, at 1 (Feb. 1970) (on file with Wayne State University, UAWR, in folder 13, box 4); Telegram from Peter Naccrato & Roy Goffett, Co-Chairmen, Downriver Anti-Pollution Project, to Warren Goemaere, Conservation & Recreation Comm. 1 (Jan. 23, 1970) (on file with Wayne State University, UAWR, in folder 26, box 5).

<sup>193</sup> Wolfe, *supra* note 192, at 5–20; W. MICH. ENV'T ACTION COUNCIL, "HISTORY" OF PASSAGE OF LANDMARK LEGISLATION—THE MICHIGAN ENVIRONMENTAL PROTECTION ACT (on file with University of Michigan, WMEACR, in box 13); Memorandum from W. Mich. Env't Action Council (Feb. 1, 1970) (on file with University of Michigan, JSP, in folder 4, box 1).

<sup>194</sup> *An Environmental Common Law for Michigan: Hearing on H.B. 3055 Before the Comm. on Conservation & Recreation* 7 (Mich. 1970) (citations omitted) (statement of Joseph L. Sax, Professor, University of Michigan) (on file with University of Michigan, JSP, in folder 3, box 1).

In spite of vigorous debate and concerns about a profusion of suits,<sup>195</sup> the bill—known as the Michigan Environmental Protection Act (MEPA)—passed the legislature unscathed and almost unanimously in June 1970.<sup>196</sup>

The ink was barely dry on Sax’s initial typewritten copy of the bill when interested individuals from other states came calling. As early as March 18, 1969, barely a month after Sax completed the first draft of MEPA and almost a year before it was actually considered in the legislature, Wolfe wrote to Anderson, “You may be interested to know that there has already been so much interest in this Act that it has been requested by organizations in three other states for their own legislators’ attention.”<sup>197</sup> “[I]t is now clear,” Sax wrote to Anderson eighteen months later, “that the Michigan experience is going to serve as a model for the whole country.”<sup>198</sup> Just as John Hammond and Bascom Johnson had evangelized their red-light abatement statute decades earlier, Sax and Anderson traveled the country, testifying before legislative hearings and academic audiences to promote the bills.<sup>199</sup>

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<sup>195</sup> See, e.g., Audio tape: Michigan Senate Debate on the Michigan Environmental Protection Act, Statement of Sen. Brown (June 26, 1970) (proposing an amendment incorporating the doctrines of collateral estoppel and res judicata “to prevent duplicity of suits”) (transcript available at University of Michigan, JSP, in folder 3, box 2); MICH. STATE CHAMBER OF COM., STATE LEGISLATION REPORT: PROPOSED CONSERVATION & ENVIRONMENTAL PROTECTION ACT BY COURT COMPLAINT AND ACTION (Jan. 15, 1970) (arguing that MEPA “would create a serious threat to the operation and growth of business and industry”) (on file with University of Michigan, JSP, in folder 4, box 1).

<sup>196</sup> H.J., 1970 Leg., Reg. Sess. 2797–98 (Mich. 1970) (on file with University of Michigan, JSP, in folder 16, box 1).

<sup>197</sup> Letter from Joan Wolfe, Chairman, W. Mich. Env’t Action Council, to Thomas J. Anderson, Mich. H.R. 1 (Mar. 18, 1969) (on file with University of Michigan, JSP, in folder 9, box 1).

<sup>198</sup> Letter from Joseph Sax, Professor, Univ. of Mich. L. Sch., to Thomas J. Anderson, Comm. on Conservation & Recreation, Mich. H.R. 1 (Aug. 13, 1970) (on file with Archives of Michigan, Thomas Anderson Papers (TAP), in folder 4, box 403).

<sup>199</sup> For Sax, see Letter from Charles M. Hassett, Assistant Professor, Univ. of Louisville Sch. of L., to Joseph Sax, Professor, Univ. of Mich. L. Sch. 1 (Oct. 12, 1973) (on file with University of Michigan, JSP, in Ky. to Minn. folder, box 4); Letter from Joseph L. Sax, Professor, to Paul Brady, Sec’y, Poricy Park Citizens Comm. (Apr. 25, 1973) (on file with University of Michigan, JSP, in Mo. to N.Y. folder, box 4); Letter from Frederick Barkalow Jr. to Joseph Sax (July 29, 1971) (on file with University of Michigan, JSP, in Mo. to N.Y. folder, box 4); Testimony of Joseph L. Sax Before the Committee on State Affairs, House of Representatives, Texas, on House Bill 56, Environmental Protection Act (Mar. 15, 1971) (on file with University of Michigan, JSP, in S.C. to Tex. folder, box 4); *Hearing on S. 3575 Before the Subcomm. on Energy, Nat. Res., and the Env’t of the S. Comm. on Com.*, 91st Cong. 27–48 (1970) [hereinafter *Hearing on S. 3575*] (statement of Joseph L. Sax, Professor of Law, Univ. of Mich.). For Anderson, see Letter from Thomas J. Anderson, State Rep., to Edwin L. Z’Berg, Assemblyman, Cal. Leg. (Apr. 6, 1971) (on file with Archives of Michigan, TAP, in folder 5, box 403); *Hearing on S. 3575, supra*, at 49–57 (statement of Thomas J. Anderson, State Rep., Mich. State Leg.).

Ultimately, between 1971 and 1975, nine states—Connecticut,<sup>200</sup> Florida,<sup>201</sup> Indiana,<sup>202</sup> Massachusetts,<sup>203</sup> Minnesota,<sup>204</sup> Nevada,<sup>205</sup> New Jersey,<sup>206</sup> North Dakota,<sup>207</sup> and South Dakota<sup>208</sup>—passed MEPA-like laws. These laws differed considerably, and none was as far-reaching as Michigan’s. Five of them, plus Michigan’s, created a substantive cause of action,<sup>209</sup> while four others only allowed standing where state laws or regulations had been violated.<sup>210</sup> Massachusetts’s law stated that suits could not be brought by individuals alone, but rather only groups of ten people or more<sup>211</sup> (which led the Associated Press to label the law “watered down”<sup>212</sup>). Four of the states specifically did not require the exhaustion of administrative remedies,<sup>213</sup> but Florida did,<sup>214</sup> and another five required notice be given to the state.<sup>215</sup> Acknowledging the limitations of judges, five states provided that a special master or referee could be appointed to render technical

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<sup>200</sup> Environmental Protection Act of 1971, Pub. Act. No. 96, 1971 Conn. Pub. Acts 149 (codified as amended at CONN. GEN. STAT. §§ 22a-14 to 22a-20).

<sup>201</sup> Environmental Protection Act of 1971, ch. 71-343, 1971 Fla. Laws 1557 (codified as amended at FLA. STAT. § 403.412).

<sup>202</sup> Act of Apr. 16, 1971, Pub. L. 182, 1971 Ind. Acts 715 (repealed 1996).

<sup>203</sup> Act of Sept. 7, 1971, ch. 732, 1971 Mass. Acts 604 (codified at Mass Gen. Laws, ch. 214, § 7A).

<sup>204</sup> Environmental Rights Act, ch. 952, 1971 Minn. Laws 2011 (codified as amended at MINN. STAT. §§ 116B.01–116.B.13).

<sup>205</sup> Act of Apr. 23, 1971, ch. 442, 1971 Nev. Stat. 860 (codified at NEV. REV. STAT. §§ 41.540–41.570).

<sup>206</sup> Environmental Rights Act of 1974, ch. 169, 1974 N.J. Laws 676 (codified as amended at N.J. STAT. ANN. §§ 2A:35A-1 to 2A:35A-14).

<sup>207</sup> North Dakota Environmental Law Enforcement Act of 1975, ch. 294, 1975 N.D. Laws 858 (codified as amended at N.D. CENT. CODE §§ 32-40-01 to 32-40-11).

<sup>208</sup> South Dakota Environmental Protection Act of 1973, ch. 144, 1973 S.D. Laws 203 (codified as amended at S.D. CODIFIED LAWS §§ 34A-10-1 to 34A-10-15).

<sup>209</sup> Joseph F. DiMento, *Citizen Environmental Legislation in the States: An Overview*, 53 J. URB. L. 413, 460 app. C (1976) (Connecticut, Indiana, Michigan, Minnesota, New Jersey, and South Dakota). Note that Professor DiMento did not include North Dakota (which had only just passed) in his analysis, though he did include California. Since the California law DiMento analyzed did not grant citizens standing to sue, I have excluded it here. *See* Act of Nov. 16, 1971, ch. 1518, § 3, 1971 Cal. Stat. 2993, 2295 (codified as amended at CAL. GOV’T CODE § 12607). Louisiana and Wyoming also did not grant standing. *See* Act of July 13, 1979, Act No. 449, § 1, 1979 La. Acts 1256, 1268–69 (codified as amended at LA. STAT. ANN. § 30:2026); Wyoming Environmental Quality Act, ch. 64, § 1, 1980 Wyo. Sess. Laws 443, 464–65 (codified as amended at WYO. STAT. § 35-11-904).

<sup>210</sup> DiMento, *supra* note 209, at 460 app. C & n.2 (Florida, Massachusetts, Nevada, and North Dakota).

<sup>211</sup> *Citizens Can Now Sue Polluters*, TRANSCRIPT (North Adams, Mass.), Sept. 8, 1971, at 12.

<sup>212</sup> *House OKs Citizen’s Right to Sue to Save Resources*, TRANSCRIPT (North Adams, Mass.), Apr. 6, 1971, at 13.

<sup>213</sup> DiMento, *supra* note 209, at 460 app. C (Connecticut, Michigan, Nevada, and South Dakota).

<sup>214</sup> *Id.* app. B.

<sup>215</sup> *Id.* app. C (Indiana, Massachusetts, Minnesota, New Jersey), plus North Dakota.

advice.<sup>216</sup> Eight statutes—all but Connecticut and Indiana—provided that a court could require a security bond.<sup>217</sup> Six allowed for the apportionment of costs,<sup>218</sup> and three allowed costs to be awarded to a victorious party.<sup>219</sup> A number of them had strikingly broad venue provisions.<sup>220</sup> Only Minnesota defined “natural resources,”<sup>221</sup> which would later prove to be significant. Two other states—Illinois in 1970 and Hawaii in 1978—amended their constitutions along lines similar to MEPA, creating a right of action for uninjured individuals to sue to enforce a state constitutional right to a healthful environment.<sup>222</sup>

Finally, in 1971 a judge in Jefferson County, Kentucky, created an “ecology court” to hear “air- and water-pollution and littering cases.”<sup>223</sup> In order to encourage county residents to report pollution and littering, the judge was authorized to “grant rewards of \$10 to \$25 to citizens whose help leads to the successful prosecution of pollution and littering cases,” although the court was also empowered to hear cases brought by state officials.<sup>224</sup> A widely circulated brochure informed citizens that it was their duty to report their neighbors “if you notice burning garbage or leaves, odors, factory fumes—any air pollution problems.”<sup>225</sup> Although this setup was distinct from the pollution abatement statutes, in empowering citizens to use the machinery of the courts to address environmental destruction the two were closely related.

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<sup>216</sup> *Id.* (Connecticut, Indiana, Michigan, Minnesota, and South Dakota).

<sup>217</sup> *Id.* (Florida, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, South Dakota, and North Dakota).

<sup>218</sup> *Id.* (Connecticut, Indiana, Massachusetts, Michigan, and Nevada), plus North Dakota.

<sup>219</sup> *Id.* (Florida, Massachusetts, and New Jersey).

<sup>220</sup> *See, e.g.*, Environmental Rights Act, ch. 169, 1974 N.J. Laws 676, 677 (codified as amended at N.J. STAT. ANN. § 2A:35A-4(a)) (allowing suit in “any court of competent jurisdiction”); Environmental Rights Act, ch. 952, § 3(4), 1971 Minn. Laws 2011, 2014 (codified at MINN. STAT. § 116B.03(4)) (“[A]ny action maintained under this section may be brought in any county in which one or more of the defendants reside when the action is begun, or in which the cause of action or some part thereof arose, or in which the conduct which has or is likely to cause such pollution, impairment, or destruction occurred. If none of the defendants shall reside or be found in the state, the action may be begun and tried in any county which the plaintiff shall designate.”).

<sup>221</sup> DiMento, *supra* note 209, at 460 app. C.

<sup>222</sup> HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; *see also* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 689–90 (1980) (on file with Hawai‘i State Archives) (advocating the amendment); 6 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 702 (1972) (same).

<sup>223</sup> *Ecology Court Convenes But No Cases Are Heard*, COURIER-J. (Louisville, Ky.), May 29, 1971, at 13.

<sup>224</sup> *Id.*

<sup>225</sup> *Dirt Doesn’t Come Cheap in This Court*, PARADE, Apr. 9, 1972, at 34, 35.

### C. *The Ideology of Private Enforcement*

All moral nuisance abatement statutes are motivated in part by a profound skepticism of the state's ability or willingness to enforce the law. Angered by, or frightened of, the perceived intransigence of public officials, private reformers create a private enforcement mechanism that empowers private citizens to utilize the machinery of the state to punish the behavior of their neighbors. The irony of this skepticism is that both red-light abatement laws and pollution abatement laws soon came to be overwhelmingly utilized by *state officials*, not private citizens. As Part II will show, the reasons for this are variable—including the expense and inconvenience of bringing suit, as well as the growing power and expertise of federal and state agencies—but both predecessors provide an interesting omen for the future of S.B. 8, which does *not* allow enforcement by public officials but similarly appears to have been motivated by a skepticism of public enforcement.<sup>226</sup> History indicates that few private actors actually bring moral nuisance abatement suits. Yet history also indicates that the paucity of suits does not detract from the significant impacts of moral nuisance abatement statutes.

The red-light abatement laws emerged at a time when red-light districts were present in virtually all major (and many minor) cities in the country. Progressive reformers were certain that bribery and graft were the norm—that local officials were thoroughly captured, and that the proceeds of prostitution financed municipal services.<sup>227</sup> For his part, Hammond fought for citizen enforcement mechanisms because he was certain that reformers couldn't rely merely on prosecutors (who, after all, could be “unfaithful” or even “a ‘double crosser’”); they had to empower “any citizen” to undertake enforcement.<sup>228</sup> He claimed that citizen enforcement mechanisms neutralized the potential for judges or prosecutors to “be influenced by local political forces.”<sup>229</sup> He was so critical of the city officials in charge of policing vice that in 1909 the superintendent of Des Moines's department of public safety physically assaulted Hammond, throwing him out of the department office and telling him never to return.<sup>230</sup> Likewise, the ASHA published a pamphlet claiming that when “[a]ny person can enjoin the owner of every house of

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<sup>226</sup> Kindy & Crites, *supra* note 13 (quoting S.B. 8 author Jonathan Mitchell as saying, “Private civil enforcement is useful when there are obstacles to conventional public enforcement”).

<sup>227</sup> See Hennigan, *supra* note 42, at 148–50.

<sup>228</sup> Hammond, *supra* note 102, at 8–9.

<sup>229</sup> John B. Hammond, *The Injunction and Abatement Law Withstands Attack*, LIGHT, Nov.–Dec. 1923, at 12, 13.

<sup>230</sup> *Hamery Must Face Trial for Fight*, DES MOINES REG., Aug. 4, 1909, at 1.

prostitution,” “[a]ction is prompt and not dependent upon prosecuting officials.”<sup>231</sup>

The environmental activists of the 1960s and 1970s were similarly motivated by a deep skepticism of public enforcement—in their case, federal agencies.<sup>232</sup> As Sax drafted MEPA, he sought to empower citizens who, prior to its passage, were “demanding judicial recognition of their rights as members of the public, su[ing] the very governmental agencies which are supposed to be protecting the public interest.”<sup>233</sup> These agencies were “gravely deficient,”<sup>234</sup> so he crafted MEPA to be “literally, an implementation of the principle that we shall have government of the people and by the people,” he told a crowd in Texas in 1973.<sup>235</sup> In line with such a vision, Michigan legislators amended the bill to empower courts to determine the validity of a regulatory agency’s finding with respect to pollution, making sure that courts would not simply defer to captured agencies.<sup>236</sup> The argument that these laws would offset the stymying effects of agency inaction or capture was consistently raised in every state that passed one.<sup>237</sup> At a legislative hearing in Connecticut, for instance, a legal services attorney testified, “the state agencies involved cannot handle all the cases. It’s not physically possible with their present resources to do it. I mean, I’ve spoken with individuals from these agencies, and they say that they just can’t handle the problems.”<sup>238</sup> In New Jersey, one proponent claimed that “the real purpose” of the bill was to ensure a right to sue

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<sup>231</sup> AM. SOC. HYGIENE ASS’N, *supra* note 120, at 5.

<sup>232</sup> See generally PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM, at ch. 5 (2021) (arguing that even the activists urging passage of the Clean Air Act and Clean Water Act profoundly distrusted federal environmental regulators).

<sup>233</sup> Sax, *supra* note 187, at 473.

<sup>234</sup> JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 62 (1971).

<sup>235</sup> Summary of Testimony of Joseph L. Sax on the Texas Environmental Protection Act of 1973, at 4 (Mar. 1, 1973) (on file with University of Michigan, JSP, in S.C. to Tex. folder, box 4) [hereinafter Summary of Testimony of Joseph L. Sax].

<sup>236</sup> S.J., 1970 Leg., Reg. Sess. 1627–31 (Mich. 1970) (on file with University of Michigan, JSP, in folder 16, box 1).

<sup>237</sup> See, e.g., Transcript of the Reconvened First Session of the Conference in the Matter of Pollution of the Navigable Waters of Galveston Bay and Its Tributaries 129 (Nov. 2–3, 1971) (on file with author); Transcripts from the Joint Standing Committee Public Hearing(s) and/or Senate and House of Representatives Proceedings 222 (Feb. 19, 1971) (on file with Connecticut State Library, Legislative History, PA 71-96 (1971)) [hereinafter Joint Standing Committee Hearing]; see also Annette B. Mis, An Investigation into Proposed Citizen Suit Legislation in New York State During the 1972-1973 Legislative Session 7 (1973) (unpublished manuscript) (“At present, or perhaps in desperation, the citizen is turning to the courts as the only source of relief—from the pollution . . .”) (on file with SUNY Albany, Louis Ismay Papers, in folder 63, box 7).

<sup>238</sup> Joint Standing Committee Hearing, *supra* note 237, at 222.

“particularly where there is an insufficient administrative enforcement.”<sup>239</sup> As one woman wrote to her senator, “Ordinary citizens need more rights to challenge bureaucratic actions which only add to the problems of pollution.”<sup>240</sup>

The scholar Paul Sabin has recently argued that the skepticism of public enforcement on the part of twentieth-century liberals contributed significantly to the demolition of the administrative state.<sup>241</sup> Sabin’s argument is persuasive, yet moral nuisance abatement statutes present a somewhat contrary narrative—at least in certain contexts.<sup>242</sup> As the following Part shows, in spite of these laws’ origins in attacking state capture, public agencies themselves would prove to be adept at capturing the skeptics’ own machinery; it would not take long for state actors to become the most prolific users of moral nuisance abatement statutes.

## II. EFFECTS

The previous Part recounted the story of the passage of the two most widespread groups of moral nuisance abatement statutes. This Part explores their implementation throughout the twentieth century. It reveals that these laws have not generated the flood of citizen suits that their opponents feared. Indeed, state agencies, not ordinary citizens, became the most frequent users of these statutes,<sup>243</sup> and even they have not used them terribly often. In spite of this minimal use, however, these laws have had tremendous impacts. This is because they are remarkably powerful as *threats*—as symbolic means of changing individual behavior and altering the geographies of sex work, pollution, and much else. This insight has considerable implications for the future of moral nuisance abatement laws (including, I argue, S.B. 8). These laws may not lead to the feared reality of vigilantes actually suing their neighbors, but they may have enormous impacts nonetheless.

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<sup>239</sup> Letter from Donald P. Sharkey, Att’y, Law Offs. of John B.M. Frohling, to Joseph Sax, Professor, Univ. of Mich. L. Sch. 1 (Apr. 23, 1971) (on file with University of Michigan, JSP, in Mo. to N.Y. folder, box 4).

<sup>240</sup> Letter from Evelyn N. Bradshaw to William Spong, U.S. Senator, Va. 1 (Nov. 7, 1971) (on file with University of Virginia, William Spong Papers (WSP), in Environmental Protection Act folder, box 15).

<sup>241</sup> SABIN, *supra* note 232, xvii–xviii.

<sup>242</sup> For an interesting critique of Sabin’s argument, see Gabriel L. Levine, *Beyond “Big Government”: Towards New Legal Histories of the New Deal Order’s End*, 121 MICH. L. REV. (forthcoming 2023) (manuscript at 6), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4083238](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4083238) [<https://perma.cc/DQB3-ENGV>].

<sup>243</sup> In this respect, moral nuisance abatement statutes resemble public nuisance law more broadly. Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 15 (2011) (“[T]he vast majority of public nuisance actions are brought by public authorities.”).

A. *Effects of Red-Light Abatement Laws*1. *Implementation*

According to John B. Hammond, no sooner had Iowa's law passed than the state's brothels "closed with a bang."<sup>244</sup> Indeed, in places such as Omaha, Nebraska, Portland, Oregon, and Duluth, Minnesota, the laws' passage spurred an immediate crackdown on red-light districts by the police and prosecutors.<sup>245</sup> By 1918, one observer could note that roughly 200 cities had closed their red-light districts, and add that the red-light abatement laws had been "very effectively used" to this end.<sup>246</sup> Usage varied from place to place, with the law being invoked in Iowa some twenty-three times in the first five years after passage and some seventy times in Nebraska in just the first three years.<sup>247</sup> In Maryland, one lawyer that brought multiple abatement actions bore the memorable name of Edgar Allan Poe.<sup>248</sup> A survey of the history of these statutes reveals that the activists that wrote them and promoted their passage remained their fiercest backers *for decades*. These activists used these laws to achieve ends that went far beyond even the broad statutory text, seeking to remake law enforcement, the law of nuisance, and urban life across the United States.

From the beginning, private antivice groups were among the laws' most avid users. In Illinois, for instance, a private reform organization called the Committee of Fifteen was "largely" responsible for the use of the red-light abatement act.<sup>249</sup> In New Jersey, most suits were undertaken by a private New York-based organization called the Committee of Fourteen.<sup>250</sup> In San Jose, a private organization called the State Law Enforcement and Protective League used the law to secure the closure of a five-story building that "had

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<sup>244</sup> John B. Hammond, *The Injunction and Abatement Law Withstands Attack*, LIGHT, Nov.–Dec. 1923, at 14; *see also Houses of Sin Must Close*, SIOUX CITY J., May 12, 1909, at 6 (issuing a warning to readers that as soon as the law went into effect, it would impact "keepers and inmates of houses of prostitution" as well as landlords).

<sup>245</sup> Johnson, *supra* note 139, at 209.

<sup>246</sup> Joseph Mayer, *The Passing of the Red Light District—Vice Investigations and Results*, 4 SOC. HYGIENE 197, 197, 204 (1918). Some of the larger cities included New York, Chicago, San Francisco, and New Orleans. *Id.* at 197.

<sup>247</sup> JOHNSON & WORTHINGTON, *supra* note 114, at 3. In Los Angeles, according to one report, the "total number of cases investigated and abated" was 331, though just a fraction of these went to court. SHREVEPORT VICE COMM'N, *supra* note 120.

<sup>248</sup> *See Proceedings in Injunction and Abatement*, 5 MD. SOC. HYGIENE SOC'Y BULL., Mar. 1922, at 1, 6, 29 (on file with University of Minnesota, ASHAR, in folder 3, box 211).

<sup>249</sup> Robert McMurdy, *The Use of the Injunction to Destroy Commercialized Prostitution*, 19 J. CRIM. L. & CRIMINOLOGY 513, 516 (1929); *see also* Hennigan, *supra* note 42, at 172–80 (providing additional information and history on the Committee of Fifteen).

<sup>250</sup> George E. Worthington, *Vice in Atlantic City: Why Not Safeguard the World's Playground?*, 13 NAT'L MUN. REV. 515, 516–17 (1924).

the reputation of being an assignation house almost since the days of the pioneers.”<sup>251</sup> Soon, the League was using the law to drive out “the vice problem” in forty-seven of California’s fifty-eight counties, with the other eleven covered by another private organization, the Morals Efficiency Association.<sup>252</sup> The ASHA also sought to empower private citizens to bring their own abatement actions, even printing fill-in-the-blank complaints to enable easy use.<sup>253</sup> Yet in a pattern that would hold true for pollution abatement acts as well, the vast majority of actions brought under the laws were actually initiated by government officials.<sup>254</sup> Nonetheless, observers overwhelmingly reported that they believed the laws decreased prostitution.<sup>255</sup> Within a few years of passage, then, it had become clear that the red-light abatement acts had changed the legal landscape of American cities, even if they had not led to an onslaught of citizen suits.

In some places, however, the reformers hoping to make use of the laws encountered considerable resistance. Just weeks after California passed its red-light abatement act, San Francisco’s mayor—himself known to frequent brothels and go riding with madams<sup>256</sup>—ordered the city’s police to destroy the famous Barbary Coast red-light district.<sup>257</sup> But many Barbary Coast property owners struck back, hitting the streets to collect petition signatures and eventually forcing a referendum.<sup>258</sup> The WCTU and ASHA led the

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<sup>251</sup> Hichborn, *supra* note 124, at 223.

<sup>252</sup> *Id.* at 224. In 1915, the Morals Efficiency Association claimed to have investigated more than 200 brothels. Johnson, *supra* note 139, at 209.

<sup>253</sup> See State of Minnesota, Sample Complaint (on file with University of Minnesota, ASHAR, in folder 3, box 211); Hennigan, *supra* note 42, at 180–81.

<sup>254</sup> JOHNSON & WORTHINGTON, *supra* note 114, at 3. “[O]nly 8 out of the approximately 100 cases brought under this law throughout these two States were brought by private effort and 5 of these 8 were brought by Mr. John B. Hammond . . .” *Id.* at 10.

<sup>255</sup> SHREVEPORT VICE COMM’N, *supra* note 120, at 2; see also Hennigan, *supra* note 42, at 170 (“Progressive social reformers at the time considered [red-light abatement laws] their ‘most effective weapon’ in the war against prostitution. In a survey of city attorneys and librarians in cities of over 30,000 people, over half the respondents listed the Red Light Abatement laws as the most effective measure in the repression of vice.”); *San Francisco’s Experience*, 5 SOC. HYGIENE 621, 622–23 (1919) (quoting Letter from James E. Colston to Edwin E. Grant (Aug. 11, 1919)) (claiming a 90% decrease in “the number of houses of ill-fame” and a 75% decrease in prostitution, and attributing this decrease to the red-light abatement laws).

<sup>256</sup> Gerald Woods, *A Penchant for Probity: California Progressives and the Disreputable Pleasures*, in CALIFORNIA PROGRESSIVISM REVISITED 102 (William Deverell & Tom Sitton eds., 1994).

<sup>257</sup> SIDES, *supra* note 123, at 22–23; see also HERBERT ASBURY, THE BARBARY COAST 302–03 (1933).

<sup>258</sup> Rockafellar, *supra* note 126, at 126–27; Hurley & Harrison, *supra* note 124, at 248; Memorandum from Bascom Johnson, *The Moral Revolution in San Francisco* 3 (1917) (on file with National Archives, California Folder, box 5, entry 395, record group 165); see also Hichborn, *supra* note 127, at 8 (noting that many names on the referendum petition were forged, but that the Secretary of State still certified the petition’s sufficiency).

charge to save the law—canvassing voters, distributing millions of pamphlets, and even urging clergy to lobby their parishioners—and in November 1914 the state voted by a slim margin to retain the law.<sup>259</sup> The red-light abatement act went into effect in December, but Woo Sam—the owner of one of the first brothels targeted by the police—quickly brought suit challenging the act’s constitutionality.<sup>260</sup> For the next two years, this lawsuit would slowly wend its way through the California judicial system. In the meantime, business continued as usual in the Barbary Coast and Upper Tenderloin red-light districts.<sup>261</sup> Indeed, it was common for such laws to stall initially as courts debated their constitutionality.<sup>262</sup>

Yet even as California’s law stalled, the ASHA and other private organizations dispatched undercover investigators into San Francisco, eager to expose prostitution.<sup>263</sup> Led by a lawyer and former Bureau of Indian Affairs investigator named Bascom Johnson,<sup>264</sup> these investigators followed young women that they thought looked promiscuous.<sup>265</sup> They consulted a list of allegedly sordid (and mostly Jewish-sounding) persons of interest—Hymie Pearlman, Abie Goldstein, Harry Auerbach, Sammy Sachs, Inez Hirsch, etc.<sup>266</sup>—and invaded buildings they thought might be brothels, “without ringing or knocking.”<sup>267</sup> Thus, when the California supreme court finally held in 1917 that the state’s red-light abatement act was

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<sup>259</sup> Matsubara, *supra* note 126, at 216; Rockafellar, *supra* note 126, at 127; Hurley & Harrison, *supra* note 124, at 248–52; Hichborn, *supra* note 124, at 218; Franklin Hichborn, *The Organization That Backed the California Red Light Abatement Bill*, 1 SOC. HYGIENE 194, 194 (1915).

<sup>260</sup> ASBURY, *supra* note 257, at 306–07; Rockafellar, *supra* note 126, at 130–31.

<sup>261</sup> Memorandum from Bascom Johnson, *supra* note 258, at 4.

<sup>262</sup> Rockafellar, *supra* note 126, at 172.

<sup>263</sup> AM. SOC. HYGIENE ASS’N, FIRST ANNUAL REPORT: 1913-1914, at 8–9 (1915) (on file with University of Minnesota, ASHAR, in folder 5, box 19); Letter from William F. Snow, Gen. Sec’y, Am. Soc. Hygiene Ass’n, to Mary Cobb (Apr. 11, 1914) (on file with University of Minnesota, ASHAR, in folder 5, box 1); *see also* Memorandum from Bascom Johnson, *supra* note 258, at 3 (expressing enthusiasm for laws that would “do away with red light districts and other forms of open and flagrant prostitution” in San Francisco); Minutes of the Meeting of the Executive Committee, Am. Soc. Hygiene Ass’n (May 16, 1916) (on file with University of Minnesota, ASHAR, in folder 5, box 5) (approving funding for the ASHA’s continued efforts in San Francisco).

<sup>264</sup> *See* Letter from Edward L. Keyes, Chairman, Comm. on Awards, to the Executive Committee, Am. Soc. Hygiene Ass’n 1 (Feb. 14, 1942) (on file with University of Pittsburgh, Thomas Parran Papers, in folder 988, box 57); *No International Meet*, RIVERSIDE DAILY PRESS, Apr. 11, 1900, at 1; *Superintendent Hall Returns from Trip*, RIVERSIDE INDEP. ENTER., Nov. 18, 1910, at 8; *S.F. Moves a Subject for Discussion*, S.F. CHRON., Aug. 4, 1915, at 3.

<sup>265</sup> Hennigan, *supra* note 42, at 123–25.

<sup>266</sup> Letter from George Kneeland, Dir., Dep’t of Investigation, Am. Soc. Hygiene Ass’n, to Thomas D. Eliot (Apr. 21, 1914) (on file with UCLA, Franklin Hichborn Papers (FHP), in Panama-Pacific Exposition folder, box 63).

<sup>267</sup> Investigation of B.B. Blake (Mar. 22, 1915) (transcript available at UCLA, FHP, in Panama-Pacific Exposition folder, box 63).

constitutional, the pro-abatement activists were ready.<sup>268</sup> The mayor and police immediately announced they would close every brothel in the city.<sup>269</sup> Hundreds of sex workers marched in opposition to the proposed closure,<sup>270</sup> but to no avail: within days, a newly formed police “morals squad”<sup>271</sup> had shut down both of the city’s red-light districts and given more than a thousand sex workers a couple of hours to pack and get out.<sup>272</sup> One question could be heard over and over from the women: “But where are we goin’?”<sup>273</sup>

Yet red-light abatement statutes did not cause prostitution to disappear. In many places, “moral reformers” and “vice interests” reached an uneasy stalemate, with official red-light districts closed as “clandestine vice flourished” and the reformers resigning themselves to “the impossibility of complete eradication of prostitution.”<sup>274</sup> In Des Moines, Hammond later reported, “a great many [sex workers] left the city. It was not our prime idea to drive them out of the city, but our idea was to drive them into decency.”<sup>275</sup> In San Francisco, sex workers simply left the safety of their shuttered brothels and set up shop on shaded street corners or in alleys. They spread across the city, beyond the boundaries of any district.<sup>276</sup> As the city’s mayor commented in 1917, “Prostitutes . . . are doubtless still active in San Francisco as the Police Department has no authority to put them to death.”<sup>277</sup> Responding to the continued presence of sex work in San Francisco, Bascom Johnson personally investigated street prostitution in the city and pushed the

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<sup>268</sup> Shumsky & Springer, *supra* note 123, at 85.

<sup>269</sup> Rockafellar, *supra* note 126, at 131; Shumsky & Springer, *supra* note 123, at 85; Hurley & Harrison, *supra* note 124, at 253; ASBURY, *supra* note 257, at 309, 311–12; Memorandum from Bascom Johnson, *supra* note 258; *Police Board Pledges Reforms in Night Life*, S.F. CHRON., Jan. 25, 1917, at 1, 3.

<sup>270</sup> Andrew Michael Bourn, *Secularizing San Francisco: Religion, Prostitution, and Public Policy, 1848-1917*, at 264–65 (2012) (Ph.D. dissertation, University of California, Santa Barbara) (on file with author); ASBURY, *supra* note 257, at 310–11; “*Would Your Congregation Take Us in Their Homes?*” *Women Ask Rev. Paul Smith*, S.F. CHRON., Jan. 26, 1917, at 1.

<sup>271</sup> *Police Morals Squad Named Lieutenant Goff in Charge*, S.F. CHRON., Feb. 3, 1917, at 5.

<sup>272</sup> ASBURY, *supra* note 257, at 311–13; Johnson, *supra* note 258; *900 Girls Driven from S.F. Resorts*, SAN JOSE MERCURY HERALD, Feb. 15, 1917, at 9; *see also* Bourn, *supra* note 270, at 268–69.

<sup>273</sup> *900 Girls Driven from S.F. Resorts*, *supra* note 272, at 9.

<sup>274</sup> Rockafellar, *supra* note 126, at 199.

<sup>275</sup> John B. Hammond, *Address to Aldermen in Chicago, Illinois* (Nov. 1912) (transcript available at University of Minnesota, ASHAR, in folder 14, box 210).

<sup>276</sup> RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1918*, at 30–32 (1982); Bourn, *supra* note 270, at 271; Hurley & Harrison, *supra* note 124, at 253; *see also* Shumsky & Springer, *supra* note 123, at 82–83, 85–87. The same was true in Bakersfield, just north of Los Angeles. *See* Jaymee Brooke Hasty, *In the Heart of the City: Prostitution and Moral Reform of Bakersfield’s Red-Light District in the Progressive Era 55–56* (2020) (M.A. thesis, California State University Bakersfield) (on file with author).

<sup>277</sup> Bourn, *supra* note 270, at 272–73 (alteration in original) (quoting *Mayor Calls Rev. Smith Impudent, Insincere; Flays Him in Letter*, S.F. CHRON., March 20, 1917, at 4).

morals squad to arrest the women—which they did at a rate of about 200 per month.<sup>278</sup> Johnson then went to San Diego, Los Angeles, and elsewhere to urge more arrests.<sup>279</sup>

Such an increase in punitive policing was a common side effect of a red-light abatement act. “[S]oon after the Abatement Act went into effect,” commented one reformer, “Los Angeles adopted the policy of treating alike both men and women held for crimes involving moral turpitude. Both on arrest are denied bail until their physical condition can be determined.”<sup>280</sup> In other words, individuals detained but not yet convicted were held (without due process) in penal facilities for compulsory testing (and, if necessary, forced treatment) for venereal disease.<sup>281</sup> Los Angeles even passed an ordinance making not merely prostitution but extramarital sex a crime.<sup>282</sup> Although Iowa’s attorney general framed the original law as increasing liability for men,<sup>283</sup> the brunt of the policing practices that developed in its wake clearly targeted women. In Bakersfield, California, for instance, injunctions pursued under the red-light abatement law quickly led to police raids against suspected brothels, in which the authorities “rounded up a large number of women.”<sup>284</sup> In another city, the mayor reported ominously that the law “did scatter the prostitutes into the resident sections at first but they were all cleaned out now.”<sup>285</sup>

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<sup>278</sup> Memorandum from Bascom Johnson, Moral Conditions in San Francisco April 25th, 1917, at 2 (May 3, 1917) (on file with National Archives, California folder, in box 5, entry 395, record group 165); Memorandum from Bascom Johnson, Preliminary Report on Moral Conditions in California June 24th to July 21st 1917, at 8 (on file with National Archives, California folder, in box 5, entry 395, record group 165); Memorandum from H.B. Woolston, Vice Conditions in Cities Visited (Feb.–June 1917) (on file with Rockefeller Archive Center, in folder 194, box 9, series 3).

<sup>279</sup> Memorandum from Bascom Johnson, Preliminary Report on Moral Conditions Surrounding the Military Camp at Linda Vista and the Naval Training Station at San Diego, California (July 17–19, 1917) (on file with National Archives, California folder, in box 5, entry 395, record group 165); Letter from Bascom Johnson, Rep., Comm’n on Training Camp Activities, Am. Soc. Hygiene Ass’n, to L.J. Wilde, Mayor of San Diego, Cal. 1 (July 22, 1917) (on file with National Archives, California folder, box 5, entry 395, record group 165); Memorandum from Bascom Johnson, Preliminary Report of Moral Conditions at Los Angeles, California, July 18th to 22, 1917, at 3 (on file with National Archives, California folder, box 5, entry 395, record group 165).

<sup>280</sup> Franklin Hichborn, *The Anti-Vice Movement in California: II. Rehabilitation*, 6 SOC. HYGIENE 365, 369 (1920); see also JENNIFER LISA KOSLOW, *CULTIVATING HEALTH: LOS ANGELES WOMEN AND PUBLIC HEALTH REFORM* 133, 137–38 (2009).

<sup>281</sup> Hichborn, *supra* note 280, at 369–72.

<sup>282</sup> AnneMarie Kooistra, *Angels for Sale: The History of Prostitution in Los Angeles, 1880-1940*, at 71 (2003) (Ph.D. dissertation, University of Southern California) (ProQuest).

<sup>283</sup> George Cosson, *Objections to Segregation* (Nov. 7, 1912) (transcript available at University of Minnesota, ASHAR, in folder 14, box 210).

<sup>284</sup> Hasty, *supra* note 276, at 54–55.

<sup>285</sup> SHREVEPORT VICE COMM’N, *supra* note 120, at 2.

The red-light abatement acts thus contributed significantly to the evolution of sex work throughout the twentieth century. As Thomas Mackey wrote, “the red-light abatement acts pushed the women out of the relative stability of their houses and vice areas and into the harsher world of hotel rooms and pimps.”<sup>286</sup> In spite of a ferocious assault on prostitution and public vice in Los Angeles, for instance, prostitution—and even brothel prostitution—flourished and grew throughout the first half of the twentieth century.<sup>287</sup> According to one scholar, following the passage of the red-light abatement act, prostitution in Los Angeles simply moved from “progressives’ own communities or business communities to areas near the Black ghetto and Mexican barrio,”<sup>288</sup> leading some barrio residents to protest “laws they felt encouraged the emergence of prostitution in their neighborhoods.”<sup>289</sup> A similar pattern recurred in Chicago and New York, where zones of prostitution likewise migrated to predominantly Black neighborhoods.<sup>290</sup> This led to these neighborhoods becoming targets of enhanced policing.<sup>291</sup> It is thus clear that the enforcement of red-light abatement acts had a racially disparate impact—an impact inflicted by white professionals against people of color. Tellingly, when providing evidence in one red-light abatement suit initiated in San Francisco, Bascom Johnson and another ASHA investigator filed affidavits with each man describing himself as “a white male citizen of the United States.”<sup>292</sup>

As the twentieth century passed, red-light acts remained on the books in almost every state. Even decades after the passage of the first law in Iowa, the acts’ foremost advocates were still pushing for their spread and use. In 1927, Hammond succeeded in lobbying New York to pass a red-light abatement act; after signing the bill, Governor Al Smith gave him the pen.<sup>293</sup> In 1935, Johnson convinced the city of Gallup, New Mexico, to pass a resolution instructing the police to “close all alleged notorious or open houses of prostitution,” a demand that would mostly translate to targeting

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<sup>286</sup> Mackey, *supra* note 42, at 261.

<sup>287</sup> See Kooistra, *supra* note 282, at 76–79.

<sup>288</sup> RICARDO ROMO, *EAST LOS ANGELES: HISTORY OF A BARRIO* 130–31 (1983).

<sup>289</sup> Kooistra, *supra* note 282, at 145.

<sup>290</sup> See KEVIN J. MUMFORD, *INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK IN THE EARLY TWENTIETH CENTURY* (1997).

<sup>291</sup> See generally ANNE GRAY FISCHER, *THE STREETS BELONG TO US: SEX, RACE, AND POLICE POWER FROM SEGREGATION TO GENTRIFICATION* (2022) (explaining how policing of prostitution led to the general expansion of policing power).

<sup>292</sup> Affidavit of Bascom Johnson (Sept. 16, 1915) (on file with University of Minnesota, ASHAR, in folder 2, box 211); Affidavit of Thomas D. Eliot, (Sept. 16, 1915) (on file with University of Minnesota, ASHAR, in folder 2, box 211).

<sup>293</sup> *Hammond Puts Over Vice Law Upon New York*, *DES MOINES REG.*, Apr. 9, 1927, at 2.

“Indian prostitutes.”<sup>294</sup> Johnson was still advocating for private citizens to use the laws in 1952.<sup>295</sup> At least as late as 1965, the ASHA was still circulating a model law that included red-light abatement provisions.<sup>296</sup> And some state authorities continued to use the red-light abatement acts for decades after their passage.<sup>297</sup> Indeed, as recently as 2017, authorities in San Francisco were using California’s law to target alleged brothels.<sup>298</sup>

## 2. *Decline*

In spite of their broad passage, enthusiastic backers, and survival in court, red-light abatement acts quickly fell into general disuse. “Since those early days from 1909 to 1920,” recorded Bascom Johnson decades later, “few private citizens or associations have found it necessary to initiate action against houses of prostitution.”<sup>299</sup> Nonetheless, these laws remained a powerful rhetorical and symbolic tool in the arsenal of antivice activists, and as such they still had a tremendous impact.

To some extent, the laws were a victim of their own success. They *did* succeed in shutting down brothels and eliminating red-light districts.<sup>300</sup> In fact, by mid-century, Johnson could claim that only a single city (Galveston, Texas) still had a red-light district.<sup>301</sup> Thus, some asserted, there was little need for private citizens to actually initiate private abatement actions. “The fact that few private citizens have been forced to use this law is evidence of the prompt response of officials generally to an aroused public opinion and to the satisfaction of citizens with the efforts of their officials,” read one

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<sup>294</sup> BASCOM JOHNSON, LAW AND ORDER AND RELATED PROBLEMS OF NAVAJO INDIANS AT GALLUP, NEW MEXICO 10–15, 20–21, 70–71, 79–80 (1935) (on file with University of Minnesota, ASHAR, in folder 9, box 100).

<sup>295</sup> Letter from Paul M. Kinsie, Dir., Div. of Legal and Soc. Prot., to Bascom Johnson (Jan. 30, 1952) (on file with University of Minnesota, ASHAR, in folder 15, box 210); Johnson, *supra* note 139, at 211.

<sup>296</sup> See STANDARD FORM OF INJUNCTION AND ABATEMENT ACT (AM. SOC. HYGIENE ASS’N 1945) (on file with University of Minnesota, ASHAR, in folder 15, box 210).

<sup>297</sup> See, e.g., *City of Tacoma v. Houston*, 177 P.2d 886, 890 (Wash. 1947) (observing that under the state’s red-light abatement statute, police officers could have launched an action in equity against an alleged house of prostitution rather than obtaining a search warrant for criminal activity); *State ex rel. Carroll v. Gatter*, 260 P.2d 360, 363 (Wash. 1953) (finding that the state’s red-light abatement law could have been appropriately used against a business, but dismissing the action as the business at issue was primarily used as a legitimate hotel rather than a house of prostitution).

<sup>298</sup> Jennifer Wadsworth, *San Jose Takes Landlords to Task—and to Court—over Scofflaw Massage Parlor Tenants*, SAN JOSE INSIDE (July 18, 2018), <https://www.sanjoinside.com/news/san-jose-takes-landlords-to-task-and-to-court-over-scofflaw-massage-parlor-tenants/> [https://perma.cc/4VVV-56F4].

<sup>299</sup> Johnson, *supra* note 139, at 210.

<sup>300</sup> Mackey, *supra* note 42, at 260–61.

<sup>301</sup> Johnson, *supra* note 139, at 210.

report from 1914.<sup>302</sup> Private reformers soon realized that the laws' "effectiveness was not commensurate with their use," Hennigan noted, examining Illinois.

On average, the Committee only sought 4.5 temporary injunctions per year. And yet, the Committee of Fifteen repeatedly praised the Injunction and Abatement law as the Committee's most effective weapon in the war against prostitution . . . . [T]he threat of an injunction, either through informal or formal notice, was enough to convince most property owners to get out of the prostitution business.<sup>303</sup>

Yet other factors undoubtedly contributed to the minimal use of the red-light abatement acts. At least one critic charged that the laws' most stalwart supporters were "too timid" to sue actual brothel keepers directly, so they instead went after easy targets, such as "a single rooming house run by a blind man."<sup>304</sup> Other ostensibly stalwart supporters were undoubtedly distracted by personal matters: indeed, two of the ASHA's own investigators became embroiled in their own sex scandals—one for owning a building used for prostitution,<sup>305</sup> and the other for contracting venereal disease himself and succumbing to syphilitic dementia.<sup>306</sup>

Johnson and an ASHA colleague noted the lack of cooperation on the part of some law enforcement officials and the apparent approval of public vice by some members of the public.<sup>307</sup> Further, where prostitution was less visible, it no longer felt like "so great a nuisance to the average householder that he feels called upon to expend the time, money and effort involved in a private suit."<sup>308</sup> Johnson and his colleague continued:

The conception of moral injury to the community by a place where prostitution is practiced without such incidents and far from the doors of most of its good citizens, has not yet been completely grasped and the civic responsibility of every good citizen for conditions throughout his city has never been fully and completely felt.<sup>309</sup>

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<sup>302</sup> AM. SOC. HYGIENE ASS'N, CONCLUSIONS FROM AN INVESTIGATION OF THE WORKINGS OF SUCH LAWS IN IOWA AND NEBRASKA MADE MAY, 1914, at 29 (on file with University of Minnesota, ASHAR, in folder 1, box 211).

<sup>303</sup> Hennigan, *supra* note 42, at 178.

<sup>304</sup> Rockafellar, *supra* note 126, at 129–30.

<sup>305</sup> See Letter from James Bronson Reynolds to John D. Rockefeller Jr. 1–3 (May 19, 1916) (on file with Rockefeller Archive Center, in folder 54, box 7, series O).

<sup>306</sup> See Letter from Raymond B. Fosdick to John D. Rockefeller Jr. 1 (May 27, 1918) (on file with Rockefeller Archive Center, in folder 62, box 8, series O).

<sup>307</sup> JOHNSON & WORTHINGTON, *supra* note 114, 8–9.

<sup>308</sup> *Id.* at 10–11.

<sup>309</sup> *Id.* at 11.

Johnson also cited the absence of “organizations equipped with funds or a sufficient force to enable them to bear the initial expense of instigating these cases or securing the necessary evidence for their prosecution.”<sup>310</sup> Especially after the initial wave of injunctions had subsided, and the red-light districts had dissipated into less public, less white spaces, many private organizations no longer had the impetus to conduct enforcement of the laws. Without the ongoing funding and mandate that state agencies enjoy, private enforcers can do their work only so long as the public remains fixated on a topic (and, often, willing to open their wallets as well).

Some also expressed concerns about the laws’ impact on private property rights. In Seattle, for instance, the mayor “expressed his doubts” about the constitutionality of Washington’s law, claiming that it “allowed for ‘confiscation of property without recompense for it to its owner.’”<sup>311</sup> To Hammond, the potential for the wrongful confiscation of property was well worth it:

Through prosecutions under this system, some one may occasionally be wronged in his property rights, but no man’s property rights are as sacred as his liberty and that of his daughters. If we must destroy some innocent man’s house that we may rescue some helpless woman from the lowest type of slavery that ever cursed the earth, let us consider his rights only after the rescue is accomplished.<sup>312</sup>

But this concern apparently led at least one court to read its state’s statute in a slightly narrow way. In Missouri, the state supreme court held that the red-light abatement act allowed “a perpetual injunction upon the defendant against using the premises, in the maintenance of a bawdyhouse” but rejected the suggestion that it allowed the “clos[ure of] the premises against any use whatsoever.”<sup>313</sup>

The final factor in limiting the laws’ use was the pronouncements of judges. Judgments as to the constitutionality of red-light abatement laws will be explored in Part III; here it will suffice to say that courts may have limited the laws’ excesses but even defeats in court ended up legitimizing the model of private abatement of alleged moral nuisances.

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<sup>310</sup> *Id.* at 10.

<sup>311</sup> Rockafellar, *supra* note 126, at 159–61 (quoting Mayor Hiram Gill).

<sup>312</sup> Hammond, *supra* note 108, at 368.

<sup>313</sup> State *ex rel.* Orr v. Kearns, 264 S.W. 775, 782 (Mo. 1924).

## B. Effects of Pollution Abatement Laws

### 1. Implementation

Mere days after MEPA's passage, Joan Wolfe organized a meeting of representatives from environmental organizations, as well as the UAW, to discuss the new law's "implications" and to plan "some kind of cooperation among organizations."<sup>314</sup> Joseph Sax would be there "to give us his thoughts," Wolfe wrote to invited guests.<sup>315</sup> The assembled partisans would discuss specific potential lawsuits and "what the Act can and can't be expected to do," as well as organization: "[t]he idea of some kind of coordination of information" and "[t]he idea of the possibility of lawyers recruited and retained on a sustained basis, so that litigation can be handled in the most knowledg[e]able and prudent manner."<sup>316</sup> So sensitive were the activists to negative publicity that some felt they should keep this meeting secret.<sup>317</sup>

According to notes from the meeting, scrawled on a small notepad that survives in the WMEAC archival papers, Sax opened the conclave. What they needed, he told his allies, was an effort "made by organized groups" to foment "the right kind of litigation."<sup>318</sup> They discussed the need for "Prototypes" of environmental litigation organizations, such as "EDF to be replicated on state level."<sup>319</sup> They talked about specific polluters such an organization could sue. They also agreed on the danger of depending too much on agencies. Sax was "[c]oncerned that control will get into public agencies," which "might acquiesce to get [the law] interpreted narrowly."<sup>320</sup> At the bottom of one page, the notes include a stand-alone clause: "Hard legal battles ahead."<sup>321</sup>

As with the red-light abatement acts, the pollution abatement laws' creators were eager to coordinate an immediate nationwide push to put them to use. But the notetaker was prescient; there were indeed hard legal battles ahead. Nonetheless, much like the red-light abatement acts, the pollution abatement acts were most powerful as threats, as symbols, and as rhetorical

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<sup>314</sup> Letter from Joan Wolfe 1 (Aug. 20, 1970) (on file with University of Michigan, WMEACR, in box 13).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> Letter from Kathleen A. Bjerke, Conservation Chairman, Sierra Club, Mackinac Ch., to Joseph Sax, Professor, Univ. of Mich. L. Sch. 1 (Aug. 26, 1970) (on file with University of Michigan, JSP, in folder 4, box 1).

<sup>318</sup> Memorandum from Joseph L. Sax, Meeting on 3055 (on file with University of Michigan, WMEACR, in box 13).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

ammunition for activists to demand that government actors enact broad-based change.

In MEPA's first sixteen months, Sax and a "state-wide network of informants" recorded thirty-six cases brought under it, most for air and water pollution but some brought "over game management, condominium development, Indian fishing rights, pesticides, highway and electric transmission lines."<sup>322</sup> Of the thirteen cases that had concluded thus far, "eight ha[d] been decided in favor of the plaintiffs and five for the defendants."<sup>323</sup> Approximately a third of all cases had been brought by public agencies, while they were defendants in roughly half the cases.<sup>324</sup> "[I]n one case there [was] a state agency on both sides."<sup>325</sup> Notably, only a few of the cases were filed by environmental organizations. Sax and his associate, Roger Conner, wrote that this was likely due to poor funding, an absence of "regular litigation counsel" and "public interest law firms," and a failure to "develop a well-defined legal strategy."<sup>326</sup> "[D]espite some opinion to the contrary," Sax wrote to a federal staffer, "these organizations are not 'litigation hungry.'"<sup>327</sup>

These problems persisted, and the rate of MEPA cases remained fairly constant at about two or three a month.<sup>328</sup> State agencies continued to make frequent use of it—a "trend" that became "even more pronounced" over time.<sup>329</sup> Established environmental groups, on the other hand, made "only modest use of MEPA in court suits," though "[l]ocal and ad hoc environmental groups" made use of it (and won) at a higher rate.<sup>330</sup> About 85% of MEPA cases were resolved before a trial.<sup>331</sup> "The prospect of judicial scrutiny seems to encourage defendants to make promises of mitigating steps that would not otherwise be made, either voluntarily or in the less intense atmosphere of administrative regulation," Sax and his colleague, Joseph

<sup>322</sup> Press Release, Univ. of Mich. 2 (Apr. 19, 1972) (on file with University of Virginia, Lowell Weicker Papers, in folder 8, box 143).

<sup>323</sup> *Id.* at 3.

<sup>324</sup> Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003, 1008 (1972).

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> Letter from Joseph Sax, Professor, Univ. of Mich. L. Sch., to Sen. Leonard Bickwit, U.S. Com. Comm. 2 (Feb. 18, 1972) (on file with University of Michigan, JSP, in SB 1032 folder, box 4).

<sup>328</sup> Joseph L. Sax, *Environmental Action: A Passing Fad?*, 85 NAT. HIST. 10, 12 (1976); Joseph L. Sax & Joseph F. DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 4–5, 7 (1974).

<sup>329</sup> Sax & DiMento, *supra* note 328, at 23.

<sup>330</sup> Jeffrey K. Haynes, *Michigan's Environmental Protection Act in Its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 J. URB. L. 589, 594–95 (1976).

<sup>331</sup> Sax, *supra* note 328, at 16.

DiMento, wrote.<sup>332</sup> According to one study, in MEPA's first thirteen years, 185 actions were filed under the law,<sup>333</sup> resulting in some significant victories.<sup>334</sup>

These patterns held across the nation. The laws were rarely utilized, with Nevada reporting *no* cases filed under its law as of 1976.<sup>335</sup> In Minnesota, only twenty-six cases using that state's law were resolved over five years, and, according to one scholar, "much, if not all, of the litigation probably would have occurred even without [the law]."<sup>336</sup> Ultimately, Minnesota's statute was consistently deployed throughout the 1970s, 1980s, and 1990s,<sup>337</sup> and Connecticut's, too, has been used relatively frequently.<sup>338</sup> Yet several other states' statutes have been used with considerably less regularity. Sax and his allies insisted that the laws were nonetheless effective as a "threat."<sup>339</sup> "We see our public agencies far more vigilant themselves, because they now have a vigilant citizenry looking over their shoulder," Sax testified before the Texas legislature.<sup>340</sup> "We see our industries and land developers more attentive than they have ever been to environmental considerations because they know that they may be called upon to prove the accuracy of their representations about environmental protection in the courtroom."<sup>341</sup>

Indeed, the only place where private citizens did widely utilize the new enforcement mechanism was the ecology court in Jefferson County, Kentucky—likely because the barriers for reporting pollution were so low.

<sup>332</sup> Sax & DiMento, *supra* note 328, at 9.

<sup>333</sup> Daniel K. Slone, *The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980's*, 12 *ECOLOGY L.Q.* 271, 273 (1985); *see also* Robert H. Abrams, *Thresholds of Harm in Environmental Litigation: The Michigan Environmental Protection Act as Model of a Minimal Requirement*, 7 *HARV. ENV'T L. REV.* 107, 118 (1983) (providing cumulative total numbers of cases from the first, third, fifth, and twentieth years after MEPA's passage).

<sup>334</sup> James M. Olson, *The MEPA: An Experiment That Works*, 64 *MICH. BAR J.* 181, 185–86 (1985).

<sup>335</sup> Sax & DiMento, *supra* note 328, at 4; DiMento, *supra* note 209, at 433 n.95.

<sup>336</sup> David P. Bryden, *Environmental Rights in Theory and Practice*, 62 *MINN. L. REV.* 163, 182, 210 (1978).

<sup>337</sup> Timothy S. Murphy, *Protection of Scenic and Aesthetic Resources Under the Minnesota Environmental Rights Act*, 17 *WM. MITCHELL L. REV.* 1190, 1190–92 (1991). Use of the statute appears to have dried up during the 1990s. *See* Michael Wieteci, *True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney's Fees into the Minnesota Environmental Rights Act*, 14 *MO. ENV'T L. & POL'Y REV.* 147, 175 & n.148 (2006).

<sup>338</sup> *See* Jennifer E. Sills, *The Connecticut Environmental Protection Act ("CEPA"): Enabling Citizens to Speak for the Environment*, 70 *CONN. BAR J.* 353, 353–54 (1996).

<sup>339</sup> Letter from Joseph L. Sax, Professor, Univ. of Mich. L. Sch., to Sen. Arthur Gibb, Vt. 1 (Dec. 8, 1970) (on file with University of Michigan, JSP, Vt. to Wis. folder, box 4); *see also* Sax & DiMento, *supra* note 328, at 12; CONSUMER INTS. FOUND., *DO CITIZEN SUITS OVERBURDEN OUR COURTS? A CASE STUDY OF THE JUDICIAL IMPACT OF STATE ENVIRONMENTAL LEGISLATION* 9 (1973).

<sup>340</sup> Summary of Testimony of Joseph L. Sax, *supra* note 235, at 4–5.

<sup>341</sup> *Id.* at 5.

In the court's first year, it operated as a once-a-week ad hoc tribunal, but it proved to be so popular that a judge started hearing cases full-time.<sup>342</sup> After a year, the number of cases heard by the court had reached 944—"with almost 200 of them being brought in by private citizens"—and the judge was handling a hundred new cases per week.<sup>343</sup> Of the first 497 polluters hauled into court, all but two were convicted.<sup>344</sup> Letters of support and inquiry flooded the courthouse, with officials from hundreds of cities writing "to see how Ecology Court works."<sup>345</sup> Other observers, however, objected to the \$25 cash rewards for reporting polluters: "Now some folks felt that smacked a little bit of bounty hunting," reported the judge.<sup>346</sup> The magazine *Life* reported on high school students hiding in the grass, trying to spot the license plates of those throwing garbage out of car windows.<sup>347</sup>

The ecology court was such a novelty that it attracted national press attention,<sup>348</sup> but much of the coverage was overblown. The court's aim, claimed the judge, "is to act as a deterrent and educator, not as a money-maker. 'On a first charge, or when the defendant proves he's making a sincere effort to correct his incinerator or whatever the source of the pollution, I usually don't fine him,' the judge says."<sup>349</sup> Usually, only big polluters were hit with big fines, and, according to one report, most private citizens refused the \$25 bounty, motivated as they were by environmental idealism.<sup>350</sup> "The Court is here to stay in Jefferson County to protect our

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<sup>342</sup> Memorandum from Fred Bales, Ecology Court—Fighting Pollution at the Grass Roots 1 (June 1972) (on file with Louisville Metro Archives, Jefferson County Judge's Office files (JCJO), in box 43, accession 1986-084, record group 2).

<sup>343</sup> *A Town on the Spy for Polluters*, LIFE, Aug. 4, 1972, at 32–33; Memorandum from Fred Bales, *supra* note 342, at 2.

<sup>344</sup> *Dirt Doesn't Come Cheap in This Court*, *supra* note 225, at 34.

<sup>345</sup> Memorandum from Fred Bales, *supra* note 342, at 3; *Dirt Doesn't Come Cheap in This Court*, *supra* note 225, at 35. The bounty aspect of the Jefferson County court may have helped alleviate the problems that red-light abatement organizations faced. When private citizens see nuisances leave their sight, they often lose the motivation to chase them down—unless there's money in it. And just as these bounties incentivized Kentucky students to make pollution their business, S.B. 8 inspired (very briefly) a cottage industry of "bounty hunters" seeking to profit from prosecuting abortion care providers. See Samantha Cole, *Reddit Bans Abortion Bounty Hunter Forum*, VICE: MOTHERBOARD (Sept. 7, 2021, 2:02 PM), <https://www.vice.com/en/article/jg83bg/reddit-bans-abortion-bounty-hunter-forum> [perma.cc/Z3LQ-BUW6].

<sup>346</sup> *Dirt Doesn't Come Cheap in This Court*, *supra* note 225, at 35.

<sup>347</sup> *A Town on the Spy for Polluters*, *supra* note 343, at 33.

<sup>348</sup> Rick Northern, *Ecology Court Is in the Spotlight*, LOUISVILLE COURIER-J., July 20, 1972, at 1.

<sup>349</sup> Memorandum from Fred Bales, *supra* note 342, at 2.

<sup>350</sup> *Id.*

citizens from polluters who do not care about the environment,” concluded one article from 1972.<sup>351</sup>

## 2. Decline

In the half century since the passage of the pollution abatement laws, many have fallen into disuse. Unlike the red-light abatement acts, the pollution abatement statutes quickly encountered fierce resistance from an ascendant conservative legal movement, from right-wing judges, and from monied industrial interests. Interestingly, they also fell into disuse because—as with red-light abatement acts—agencies did not prove to be the enemies the laws’ promoters believed them to be; instead, they essentially captured these laws and folded them into their broader administrative apparatus.

One significant reason for the rapid decline in use is environmental lawyers’ increasing reliance on state and federal agencies. Throughout the late twentieth century, as environmental litigators became more focused on working with agencies—rather than working against them—their activism became more focused on working within the administrative machinery, rather than challenging that machinery in the courts.<sup>352</sup> Only half of the pollution abatement acts enabled a citizen suit in the absence of a violation of the law,<sup>353</sup> meaning that environmentalists’ ability to sue was often dependent on state agencies’ definitions of, and permits with respect to, pollution; further, agencies were some of the laws’ most enthusiastic users.<sup>354</sup> In Massachusetts, one scholar found that the pollution abatement law “supplanted the citizen-suit statute by creating an administrative system that emphasizes reliance on regulatory agencies.”<sup>355</sup> Indiana’s law, by contrast, allowed the state agency to hold a hearing and make a determination (which it had 180 days to do) before plaintiffs could sue,<sup>356</sup> presenting “barriers” that have “prevented the Indiana act from being used very frequently.”<sup>357</sup>

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<sup>351</sup> Memorandum on the Ecology Ct. of Jefferson Cnty., Ky. 3 (1972) (on file with Louisville Metro Archives, JCJO, in box 43, accession 1986-084, record group 2).

<sup>352</sup> Joseph DiMento, *Asking God to Solve Our Problems: Citizen Environmental Suit Legislation in the Western States*, 2 *UCLA J. ENV’T L. & POL’Y* 169, 178 (1982); Sabin, *supra* note 171, at 972, 999.

<sup>353</sup> George et al., *supra* note 43, at 15, 17.

<sup>354</sup> See Slone, *supra* note 333, at 308–09.

<sup>355</sup> Diane K. Danielson, *Environmental Regulation in Michigan and Massachusetts: Two Statutes with Two Different Solutions to the Same Problem*, 20 *B.C. ENV’T AFFS. L. REV.* 99, 101 (1993).

<sup>356</sup> *Sekerez v. U.S. Reduction Co.*, 344 N.E.2d 102, 103 (Ind. Ct. App. 1976); *Sekerez v. Youngstown Sheet & Tube Co.*, 337 N.E.2d 521, 524 (Ind. Ct. App. 1975); *IND. CODE* § 13-30-1-1; Jeffrey L. Carmichael, Note, *The Indiana Environmental Policy Act: Casting a New Role for a Forgotten Statute*, 70 *IND. L.J.* 613, 642–44 (1995).

<sup>357</sup> Peter H. Lehner, *The Efficiency of Citizen Suits*, 2 *ALB. L. ENV’T OUTLOOK* 4, 10 (1995).

Further, as the judiciary turned increasingly to the right in the 1980s,<sup>358</sup> state judges began interpreting state standing provisions in more restrictive ways, guided by influential—albeit nonbinding—developments in federal standing doctrine.<sup>359</sup> The court cases will be explored in Part III, but the fate of Kentucky’s unique “ecology court” shows that the broader rightward turn in national politics and the attendant decline could limit private abatement of pollution even without binding judicial pronouncements. The number of cases heard by Kentucky’s ecology court fell sharply after its first year, reflecting the drop in national interest in matters of ecology.<sup>360</sup> And though the court continued operating for decades, by the early 1990s its docket had shifted away from large-scale pollution to “cases dealing with vehicle-exhaust testing, housing-code violations, bad checks and other matters.”<sup>361</sup>

Finally, the cost of litigating environmental citizen suits has been a significant problem for potential plaintiffs. Minnesota, for instance, “imprudently lacks provision for an award of attorney’s fees and costs in environmental citizen suits,” wrote the scholar Michael Wietecki.<sup>362</sup> As a result, “the statute effectively provides standing only to those with considerable financial resources, or for those who use it as a shield of last-resort.”<sup>363</sup> The financial burden this places on potential litigants prevents many from filing citizen suits, thus defeating the purpose of the law.<sup>364</sup> This issue is not limited to Minnesota. Indeed, only half of the pollution abatement laws provide for an award of fees and costs.<sup>365</sup> Even where a statute provides

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<sup>358</sup> For a more in-depth chronicle of the increase in right-wing control of the federal judiciary, see HERMAN SCHWARTZ, *RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS* (2004); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

<sup>359</sup> Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 435 (2018) (noting that “a number of state court decisions have expressly rejected *Lujan*’s approach to standing as a requirement for state justiciability”).

<sup>360</sup> *Ecology Court ‘Goes to Dogs’ As Pollution Cases Fall Off*, LOUISVILLE COURIER-J., July 28, 1975, at 16.

<sup>361</sup> See *Jefferson Prosecutor Is Apparently Kentucky’s First Black Female Judge*, LOUISVILLE COURIER-J., Mar. 3, 1992, at 11 (reporting on the appointment of a new judge who would preside over the ecology court).

<sup>362</sup> Michael Wietecki, *True Access to the Courts for Citizens Working to Protect Natural Resources: Incorporating Attorney’s Fees into the Minnesota Environmental Rights Act*, 14 MO. ENV’T L. & POL’Y REV. 147, 169 (2006).

<sup>363</sup> *Id.* at 149.

<sup>364</sup> See *id.* at 177.

<sup>365</sup> George et al., *supra* note 43, at 18.

for some costs, oversights during the drafting process can cost environmental attorneys their chance at recovering fees.<sup>366</sup>

### C. State Capture and the Power of a Threat

The history recounted thus far in this Part shows that public officials brought a substantial number of suits under both laws. Indeed, the contrast between the laws' aims and their realities was so striking that promoters of both attempted to recast this as an advantage or a sign of the laws' success. Johnson and an ASHA colleague claimed Iowa as a success story because the state's citizens had come to rely on "a vigorous, effective and incorruptible" attorney general "to produce results through their own officials rather than to use the Injunction Law themselves which involves time, money and expense."<sup>367</sup> Sax, meanwhile, declared himself "delighted to report [that agencies] view the bill as an additional weapon available to them in dealing with pollution, rather than as a club to be wielded against them by foolish, furious citizens."<sup>368</sup> Sax framed the absence of citizen suits as a positive when lobbying state officials,<sup>369</sup> and allies even started claiming the laws would "bolster" agencies.<sup>370</sup> Johnson, Sax, and their compatriots may well have changed their minds regarding public agencies—Johnson and Sax both joined federal agencies themselves,<sup>371</sup> and environmentalists in general soon began to place their "hope" in agencies<sup>372</sup>—or they may have simply tried to put a positive spin on a disconcerting state of affairs. In any case, their altered rhetoric reflects a striking reality: agencies had *captured* their beloved laws.

What does such an observation portend for the future of S.B. 8 and its inevitable copycats? After all, S.B. 8 expressly forbids agency use. In light of the fact that two of its predecessors were overwhelmingly eschewed by private citizens and used by public agents, S.B. 8's wide use seems unlikely.

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<sup>366</sup> See *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 653–54 (Mich. 1998); James M. Olson & Christopher M. Bzdok, *The MEPA Lives—in Northern Michigan and Beyond*, 78 MICH. BAR J. 418, 420 (1999).

<sup>367</sup> JOHNSON & WORTHINGTON, *supra* note 114, at 12.

<sup>368</sup> Letter from Joseph L. Sax, Professor, Univ. of Mich. L. Sch., to Thomas H. Kean, Assemblyman, N.J. 1 (Feb. 3, 1971) (on file with University of Michigan, JSP, in Mo. to N.Y. folder, box 4).

<sup>369</sup> Letter from Joseph L. Sax, Professor, Univ. of Mich. L. Sch., to Wallace H. Spencer, Special Assistant to the Governor, Wash. 1 (July 2, 1971) (on file with University of Michigan, JSP, in Vt. to Wis. folder, box 4).

<sup>370</sup> Beatrice Marty, Testimony Before House Environmental Matters Committee 1 (Apr. 3, 1978) (on file with Maryland State Law Library, Legislative File, SB 942 (1978)).

<sup>371</sup> STERN, *supra* note 131, at 48, 212; Martin, *supra* note 172.

<sup>372</sup> DiMento, *supra* note 352, at 178.

Indeed, early reports indicate that the law has not been broadly used so far.<sup>373</sup> It appears that one of the first two suits brought under the law was by an opponent who urged the courts to strike it down.<sup>374</sup> Yet wide use may well not have been S.B. 8's drafter's goal—nor does its “success” appear to depend on a multiplicity of suits (private or otherwise). Rather, S.B. 8—like red-light and pollution abatement statutes before it—appears to be most powerful as a threat.

From the very beginning, activists wielded red-light abatement laws to intimidate state and private actors into preemptively changing behavior. Even before the first red-light abatement statute went into effect, Iowa cities began “driving out” red-light districts with the threat of enforcement.<sup>375</sup> The law “has made [brothel owners and keepers] more careful to prevent the use of their property for immoral purposes,” asserted one ASHA chronicler.<sup>376</sup> “In fact, the mere passage of such a law has in a number of instances resulted in the wholesale closing of recognized houses.”<sup>377</sup>

Over and over, the laws' champions attributed to them an almost miraculous deterrent power, an ability to effect change without the need for actual use.<sup>378</sup> One city's “Commissioner of Public Safety” claimed, “There has been little need of prosecutions, as with proper publicity given to the drastic terms of the measure, notice to move or be prosecuted has always brought results.”<sup>379</sup> Such claims do have some grounding in reality: charts compiled by the scholar Peter Hennigan document how effective Illinois's red-light abatement law was in shuttering brothels even without suits being filed.<sup>380</sup> Hammond later recalled that within a single day of the law's passage,

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<sup>373</sup> Eleanor Klibanoff, *Six Months In, “No End in Sight” for Texas’ New Abortion Law*, TEX. TRIB. (Mar. 1, 2022, 5:00 AM), <https://www.texastribune.org/2022/03/01/texas-abortion-law-supreme-court/> [https://perma.cc/Y3D8-KE5Q] (“Beyond those initial three claims, no lawsuits have been brought against anyone for aiding or abetting in a prohibited abortion.”); Devin Dwyer, *2 Disbarred Attorneys Outside Texas Sue Abortion Doctor Under SB8*, ABC NEWS (Sept. 21, 2021, 5:31 PM), <https://abcnews.go.com/Politics/disbarred-attorneys-texas-sue-abortion-doctor-sb8/story?id=80147133> [https://perma.cc/63DH-DTQ9] (“Over the last three weeks, there appears to be a concerted effort within the anti-abortion rights community to stop people from filing lawsuits under SB8 in order to preserve the status quo.”).

<sup>374</sup> Dwyer, *supra* note 373.

<sup>375</sup> *New Laws Stamp Out Many Evils*, DES MOINES REG., May 22, 1909, at 5.

<sup>376</sup> Mayer, *supra* note 246, at 204.

<sup>377</sup> *Id.*

<sup>378</sup> Mackey, *supra* note 42, at 91; *see also* Letter from George E. Worthington to G.S. Cole, *supra* note 138, at 2 (“The experience has been almost invariably that if you succeed in abating one place under the Injunction and Abatement Law about all you will have to do with the other places will be to serve a preliminary notice on them and the owners will dispossess their tenants and police their own premises in the future.”).

<sup>379</sup> SHREVEPORT VICE COMM’N, *supra* note 120, at 26.

<sup>380</sup> Hennigan, *supra* note 42, at 176.

“there was not an open public house of prostitution in the state of Iowa.”<sup>381</sup> A comparison to the availability of abortion providers in Texas immediately after S.B. 8 took effect is particularly apt: the availability and performance of abortions plummeted in Texas even as courts mulled the constitutionality of the law.<sup>382</sup> Experts predicted that even if the Supreme Court overturned the laws, clinics would still close for good.<sup>383</sup>

The pollution abatement statutes, too, were more powerful in theory than in usage. “Polluters: Beware,” warned an article in the *Christian Science Monitor*.<sup>384</sup> “The neighbor who stood hopelessly by while you sent black smoke belching into the air and discharged wastes into the water may be preparing to take you to court.”<sup>385</sup> After surveying all the laws on the books in 1973, the Consumer Interests Foundation asked, in effect, whether they should be considered a failure. “Does the relatively small number of suits in these seven states indicate that private citizens and environmental groups cannot be expected to play a significant role in law enforcement?” the authors asked.<sup>386</sup> “The data do not, we believe, permit such a conclusion.”<sup>387</sup> Rather, the authors accepted Sax’s view that industrial and agency behavior “may be modified by the fear of a lawsuit and its attendant publicity.”<sup>388</sup> Indeed, these laws were apparently useful even in at least one state where no such law had passed. In 1974 in Tennessee, a lower court judge ruled (in a dispute over a regional prison site) that “any citizen has ‘standing’ to sue governmental officials for their ‘acts or omissions’ in protecting resources held ‘in trust’ by the state.”<sup>389</sup>

A comparison to S.B. 8 is instructive. As the *Christian Science Monitor* intimated about the pollution laws, the Texas abortion law’s power is in convincing people that their neighbors are watching them—and might be preparing to take them to court at any moment. “S.B. 8 is designed to ensure that the threat of enforcement suits deters providers from performing covered

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<sup>381</sup> Hammond, *supra* note 108, at 366.

<sup>382</sup> Chloe Atkins, *Texas Independent Clinics Fight to Survive Under Restrictive Abortion Law*, NBC NEWS (Nov. 13, 2021, 4:30 AM), <https://www.nbcnews.com/news/us-news/texas-independent-clinics-fight-survive-under-restrictive-abortion-law-n1283696> [<https://perma.cc/M7AR-CLVC>].

<sup>383</sup> Shefali Luthra, *Even if Texas’ Six-Week Abortion Ban Is Overturned, Clinics Will Close*, 19TH NEWS (Sept. 1, 2021, 5:25 PM), <https://19thnews.org/2021/08/texas-abortion-six-week-ban-clinics-close-their-doors/> [<https://perma.cc/7PA6-9LT7>].

<sup>384</sup> Monty Hoyt, *Polluter, Beware Thy Neighbor*, CHRISTIAN SCI. MONITOR, Sept. 18, 1971, at 1 (on file with University of Michigan, William G. Milliken Papers, in box 755).

<sup>385</sup> *Id.*

<sup>386</sup> CONSUMER INTS. FOUND., *supra* note 339, at 9.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> Kenneth Jost, *Ruling May Expand Public’s Right to Sue*, NASHVILLE TENNESSEAN, July 1, 1974 (on file with University of Michigan, JSP, in S.C. to Tex. folder, box 4).

abortions altogether,” wrote the acting solicitor general in *United States v. Texas*.<sup>390</sup> This is the central purpose of the law (one with significant historical precedent): to inspire fear by its very existence, *not* to actually lead to “an avalanche of lawsuits,” as some abortion advocates fear.<sup>391</sup> Indeed, the legislative director of Texas Right to Life told a newspaper that the law’s “ultimate goal . . . is to incentivize abortion providers to comply with the law instead of fighting it in court.”<sup>392</sup>

### III. CONSTITUTIONALITY

Beginning shortly after their passage, moral nuisance abatement statutes have been considered repeatedly by courts across the country. In the early twentieth century—before the creation of the modern federal standing doctrine—the citizen-suit provision in red-light abatement statutes was rarely even challenged, and courts broadly upheld the laws’ constitutionality. Later in the century, however—as courts were simultaneously assessing pollution abatement statutes and establishing a standing doctrine fixated, first and foremost, on injury<sup>393</sup>—the constitutionality of moral nuisance abatement statutes, with their establishment of standing in the total absence of injury, was in some doubt. Yet, while these laws would undoubtedly be unconstitutional under federal standing principles,<sup>394</sup> they have been broadly upheld under distinct state standing doctrines.<sup>395</sup> This Part reviews the history of these decisions, tracking the survival of moral nuisance abatement statutes in court. It then turns once again to S.B. 8 to briefly consider the constitutionality of laws that take moral nuisance abatement statutes even further—by dispensing not merely with the requirement of injury for private enforcers but also with the possibility of any public enforcement at all.

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<sup>390</sup> Brief for the United States at 4, *United States v. Texas*, 142 S. Ct. 522 (2021) (No. 21-588).

<sup>391</sup> Douglas, *supra* note 16.

<sup>392</sup> Shannon Najmabadi, *Gov. Greg Abbott Signs into Law One of Nation’s Strictest Abortion Measures, Banning Procedure as Early as Six Weeks into a Pregnancy*, TEX. TRIB. (May 19, 2021, 11:00 AM), <https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law/> [https://perma.cc/3AGW-48WX].

<sup>393</sup> *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 735–36 (1972) (holding that “the ‘injury in fact’ test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured”).

<sup>394</sup> *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (“Congress’s creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III . . . .”); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) (holding that a plaintiff does not “automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation”).

<sup>395</sup> *See Zachary D. Clopton, Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 435 (2018).

### A. Constitutionality of Red-Light Abatement Laws

Perhaps because of fears of public exposure and humiliation, few whose property was targeted under the red-light abatement acts challenged the laws in court. In 1913, one eager Oregon district attorney filed sixty-eight suits under that state's new red-light abatement law—"and none of these were appealed."<sup>396</sup> A generation later, in 1931, a West Virginia public health official boasted that her state's law "has been applied to over fifty houses in West Virginia without an appeal."<sup>397</sup> And the early signs were promising: in Iowa, the very first trial judge to consider the red-light abatement statute (in an action brought by Hammond himself in 1909) found it to be "airtight."<sup>398</sup>

Nonetheless, by the mid-1910s, lawsuits challenging the constitutionality of the red-light abatement acts had reached the highest courts in more than a dozen states. The acts' champions immediately moved to head off such attacks. The ASHA circulated a "Model Brief" to assist advocates in defending the laws in court.<sup>399</sup> The ASHA also revised its model law in response to emerging court precedent in order to safeguard the law against judicial skepticism.<sup>400</sup> In California, Bascom Johnson and other activists joined forces to safeguard "the law through the gauntlet of court decisions with [their] own attorney."<sup>401</sup> These efforts were broadly successful.<sup>402</sup> According to one 1920 analysis, the laws were almost "uniformly" upheld.<sup>403</sup> State supreme courts in California,<sup>404</sup> Colorado,<sup>405</sup> Georgia,<sup>406</sup> Illinois,<sup>407</sup> Massachusetts,<sup>408</sup> Minnesota,<sup>409</sup> Montana,<sup>410</sup> Nebraska,<sup>411</sup> and Washington,<sup>412</sup> as well as the D.C. Circuit,<sup>413</sup> affirmed the

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<sup>396</sup> Rockafellar, *supra* note 126, at 137.

<sup>397</sup> Letter from Ada C. McDermott, Assoc. Dir., Bureau of Venereal Diseases, to Am. Soc. Hygiene Ass'n (Jan. 13, 1931) (on file with University of Minnesota, ASHAR, in folder 15, box 210).

<sup>398</sup> *First Test of the Cosson Law*, MO. VALLEY TIMES, July 29, 1909, at 6.

<sup>399</sup> Hennigan, *supra* note 42, at 187–88.

<sup>400</sup> *Id.* at 183–84.

<sup>401</sup> Rockafellar, *supra* note 126, at 128.

<sup>402</sup> AM. SOC. HYGIENE ASS'N, *supra* note 120.

<sup>403</sup> *Current Legislation*, *supra* note 138, at 605.

<sup>404</sup> *People ex rel. Bradford v. Barbieri*, 166 P. 812, 815 (Cal. Dist. Ct. App. 1917).

<sup>405</sup> *Gregg v. People*, 176 P. 483, 485 (Colo. 1918).

<sup>406</sup> *Williams v. State ex rel. McNulty*, 104 S.E. 408, 410 (1920).

<sup>407</sup> *People ex rel. Thrasher v. Smith*, 114 N.E. 31, 32 (Ill. 1916).

<sup>408</sup> *Chase v. Proprietors of Revere House*, 122 N.E. 162, 166 (Mass. 1919).

<sup>409</sup> *State ex rel. Wilcox v. Gilbert*, 147 N.W. 953, 957–58 (Minn. 1914).

<sup>410</sup> *State ex rel. Ford v. Young*, 170 P. 947, 948 (Mont. 1918).

<sup>411</sup> *State ex rel. English v. Fanning*, 149 N.W. 413, 413 (Neb. 1914).

<sup>412</sup> *State ex rel. Dow v. Nichols*, 145 P. 986, 986–87 (Wash. 1914); *State v. Jerome*, 141 P. 753, 754–56 (Wash. 1914).

<sup>413</sup> *Holmes v. United States*, 269 F. 489, 493 (D.C. Cir. 1920).

laws' constitutionality.<sup>414</sup> In New York, the state's highest court (on which sat then-Judge Benjamin Cardozo) held that to strike down such a statute would "restrict the Legislature in a manner not contemplated by the framers of the state and federal Constitutions."<sup>415</sup> In California, an appellate court noted that the relief provided for in the law may be "drastic," but the conditions it sought to remedy were so unacceptable that such relief was warranted.<sup>416</sup> The citizen-suit provision, though infrequently challenged, was also upheld.<sup>417</sup>

Although most courts upheld red-light abatement laws, some narrowed their uses or struck down pieces of them on technicalities. In California, for instance, one superior court judge held that the citizen-suit provision at the heart of California's act was unconstitutional because it allowed a citizen to "maintain the action in his own name"—this judge insisted that the state constitution demanded "that the proceeding must run in the name of the people of the state of California."<sup>418</sup> In Iowa, the state supreme court held that the state's law had been unconstitutionally ratified (the speaker of its state house had never signed the bill), so supporters hastily reenacted it.<sup>419</sup>

And in one state—New Jersey—a court struck down the law outright.<sup>420</sup> In 1919, after a resident of Newark brought an abatement action against an alleged brothel in chancery court, the Court of Errors and Appeals declared New Jersey's law unconstitutional, largely because the court construed it as "attempt[ing] to add to the equitable powers possessed by the Court of Chancery, the power to deal with a certain class of criminal cases by the writ of injunction, and the summary process of contempt."<sup>421</sup> The attorneys who defended the law's constitutionality, and their allies within the ASHA, were

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<sup>414</sup> *Current Legislation*, *supra* note 138, at 608.

<sup>415</sup> *People ex rel. Lemon v. Elmore*, 177 N.E. 14, 16 (N.Y. 1931).

<sup>416</sup> *People v. Bayside Land Co.*, 191 P. 994, 995 (Cal. Dist. Ct. App. 1920). Similarly, upholding Texas's law, the state's supreme court clarified that a property owner's knowledge as to their property's use for "immoral" purposes was irrelevant, because the property itself, and not the owner, was the target, *Moore v. State*, 181 S.W. 438, 440 (Tex. 1915). One justice decried this in dissent as the "broadest exercise of judicial power in such matters ever spread upon any court record in the English language." *Id.* at 443–46 (Hawkins, J., dissenting).

<sup>417</sup> *People v. Casa Co.*, 169 P. 454, 457 (Cal. Dist. Ct. App. 1917).

<sup>418</sup> O'Grady, *supra* note 140, at 8.

<sup>419</sup> See Hennigan, *supra* note 42, at 167 & n.229 (citing *State ex rel. Hammond v. Lynch*, 151 N.W. 81 (Iowa 1915)). For Hammond's brief in this case, see Brief for Appellant, *State ex rel. Hammond*, 151 N.W. 81 (on file with University of Minnesota, ASHAR, in folder 2, box 211).

<sup>420</sup> *Current Legislation*, *supra* note 138, at 607; see *Hedden v. Hand*, 107 A. 285, 291 (N.J. 1919).

<sup>421</sup> *Hedden*, 107 A. at 288.

shocked.<sup>422</sup> In the decision's wake, investigators reported that Atlantic City's red-light district quickly reopened.<sup>423</sup> In the years that followed, private undercover investigators monitored the "vice" situation in Atlantic City.<sup>424</sup> The state passed a "vice repressive law" that made it a misdemeanor to keep or maintain a brothel,<sup>425</sup> but New Jersey never again passed a red-light abatement law.<sup>426</sup>

Yet even the defeat in New Jersey illustrated how broadly accepted the enforcement mechanism underlying the red-light abatement laws had become. Notably, courts<sup>427</sup> and commentators<sup>428</sup> were quite critical of the New Jersey decision, and no other state copied its reasoning.<sup>429</sup> This reflected just "how far the common law of public nuisance had traveled over the preceding forty years," Hennigan wrote.<sup>430</sup> "The rejection of [the New Jersey case] is testimony to the evisceration of the common law of public nuisance in American legal discourse. Public nuisance law still existed, but many now believed that it could (and should) be expanded to include private equitable actions."<sup>431</sup>

### B. Constitutionality of Pollution Abatement Laws

Because the pollution abatement laws emerged concomitantly with the rise of the conservative legal movement, their fate in court diverged sharply from that of the red-light abatement statutes. Sax had decried the Court's 1972 implication that only plaintiffs with "a user or property-type interest in a case" would be allowed to sue,<sup>432</sup> and the Court doubled down on this approach in the coming decades. The Court ultimately articulated a new, restrictive test for standing: plaintiffs must have suffered an "injury-in-fact,"

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<sup>422</sup> Hennigan, *supra* note 42, at 189; Worthington, *supra* note 250, at 517; Letter from Arthur T. Vanderbilt to Timothy Pfeiffer (Oct. 11, 1919) (on file with University of Minnesota, ASHAR, in folder 3, box 211); Letter from Timothy Pfeiffer to Arthur T. Vanderbilt (Oct. 10, 1919) (on file with University of Minnesota, ASHAR, in folder 3, box 211).

<sup>423</sup> Worthington, *supra* note 250, at 518.

<sup>424</sup> *Id.* at 519–20.

<sup>425</sup> *Id.* at 518–19, 522 (citing N.J. Pub L. 1922, ch. 240).

<sup>426</sup> See Johnson, *supra* note 139, at 207.

<sup>427</sup> See *United States v. Reinking*, 283 F. 855, 856 (D.N.J. 1922); *Bd. of Health of Hillside v. Mundet Cork Corp.*, 126 N.J. Eq. 100, 107 (1939); *State ex rel. State Bd. of Milk Control v. Newark Milk Co.*, 118 N.J. Eq. 504, 515–17 (1935); *People ex rel. Lemon v. Elmore*, 177 N.E. 14, 16 (N.Y. 1931); *Williams v. State*, 104 S.E. 408, 410 (Ga. 1920).

<sup>428</sup> See, e.g., *Current Legislation*, *supra* note 138, at 607 (noting that *Hedden* conflicted with a "large number of American cases").

<sup>429</sup> Hennigan, *supra* note 42, at 191.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at 192.

<sup>432</sup> Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RES. J. 76, 78 (1973).

which is “fairly traceable” to the challenged action of the defendant, and it must be likely that the plaintiff’s injury will be “redressed” by a favorable decision.<sup>433</sup> Although this approach applied only to federal cases, some state judges began applying similar principles to pollution abatement laws—as, for instance, in Hawaii.<sup>434</sup> In other states, this occurred through statutory means—as in Florida, where in 2002 Governor Jeb Bush signed a bill to narrow the standing grant in his state’s pollution abatement law, ironically pairing this legislation with an Everglades restoration bill.<sup>435</sup>

Other pollution abatement acts proved to be poorly or too narrowly worded. And with a bench chock-full of increasingly unfriendly judges, this was sometimes fatal to the laws. One analysis of Indiana’s law found that it was “impotent” because of its demand that plaintiffs show “significant” pollution, which defendants could rebut with evidence of compliance with applicable pollution standards.<sup>436</sup> The “poor drafting and contradictory language”<sup>437</sup> of Maryland’s law led its state court of appeals to rule in 1990 that standing to sue under this law was narrower than federal standing.<sup>438</sup> In Illinois, the state supreme court likewise interpreted the wording of its pollution abatement constitutional amendment to foreclose citizen suits in the absence of a statutory or common law cause of action.<sup>439</sup>

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<sup>433</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558–61 (1995). Notably the notion of “injury in fact” has continued to evolve in confusing ways. In 2017, scholars Craig Konnoth and Seth Kreimer identified “no less than six stages on the way to assessing ‘injury in fact’: (i) a particularization inquiry; (ii) a tangibility inquiry; and, if ‘intangible’: (iii) a constitutional inquiry; (iv) a historical inquiry; and, if Congress has acted: (v) an inquiry into consequent ‘real harm;’ and (vi) the ‘material’ risk thereof.” Craig Konnoth & Seth Kreimer, *Spelling Out Spokeo*, 165 U. PA. L. REV. ONLINE 47, 50 (2016) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

<sup>434</sup> *In re Application of Maui Elec. Co.*, 408 P.3d 1, 22 (Haw. 2017), *aff’g* *Sierra Club v. Dep’t of Transp.*, 167 P.3d 292, 313 (Haw. 2007).

<sup>435</sup> Lawrence E. Sellers Jr. & Cathy M. Sellers, “*Intervene*” Means “*Intervene*”: *The Florida Legislature Revises Citizen Standing Under F.S. § 403.412(5)*, 76 FLA. BAR J. 63, 64–65 (2002).

<sup>436</sup> Mary Jane Rhoades, Note, *The Indiana Environmental Protection Act: An Environmentalist’s Weapon in Need of Repair*, 22 VAL. U. L. REV. 149, 153–54 (1987).

<sup>437</sup> Daniel W. Ingersoll IV, *Impediments to Environmental Justice: The Inequities of the Maryland Standing Doctrine*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 491, 499 (2006); *see also* Johanna Gnall, *Addressing Maryland’s Restrictive Environmental Standing Law: Maryland’s Environmental Standing Law Must Be Reformed to Allow an Individual to Have Standing to Sue Based on Aesthetic or Recreational Injury and to Permit an Organization to Have Standing to Sue on Behalf of a Member Asserting an Aesthetic or Recreational Injury*, 16 U. BAL. J. ENV’T L. 151, 152 (2009) (highlighting the contradictory nature of the Maryland law).

<sup>438</sup> *Med. Waste Assoc. v. Md. Waste Coal.*, 612 A.2d 241, 254 (Md. Ct. App. 1990).

<sup>439</sup> *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 962 N.E.2d 956, 967 (Ill. 2012); *see also* *Morford v. Lensey Corp.*, 442 N.E.2d 933, 937 (Ill. App. Ct. 1982) (holding that this amendment likewise did not create a cause of action for tenants against landlords where leased premises are unhealthful).

In contrast, detailed wording could aid environmentalists seeking to use these statutes. In Minnesota, for instance, courts have repeatedly affirmed standing for “any person,” and citizens have successfully used the statute in part because of the law’s “exhaustive list of definitions, including a definition of the term ‘person,’” which has “provided critical guidance to the Minnesota courts.”<sup>440</sup> Likewise, the North Dakota Supreme Court has recently interpreted its abatement law broadly, in large part because the statute itself defined terms such as “aggrieved” specifically and expansively.<sup>441</sup>

It is notable that, in spite of the rightward turn of federal courts and the evolution of an ever-narrower standing doctrine, most pollution abatement laws remain in statute books today. This is not just due to savvy wording. Rather, even with an entire legal system arrayed against antipollution efforts, the logic of private abatement of moral nuisances has continued to appeal to judges (aided by distinct state standing principles).<sup>442</sup> Indeed, S.B. 8 is evidence of a further evolution of this logic: the elimination of the possibility of public enforcement altogether.

### C. S.B. 8 and the Search for a Bright-Line Test

In part because courts have not yet identified moral nuisance abatement statutes as belonging to a common class, there is no clear principle to limit how far these laws can go. Allowing uninjured plaintiffs to sue to eliminate the things they don’t like raises the question: what is a moral nuisance, after all? Is there any limit to a legislature’s power to designate something so noxious to the social order that any person, with any motivation, should be allowed to seek its annihilation?

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<sup>440</sup> Andrew J. Piela, *A Tale of Two Statutes: Twenty Year Judicial Interpretation of the Citizen Suit Provision in the Connecticut Environmental Protection Act and the Minnesota Environmental Rights Act*, 21 B.C. ENV’T AFFS. L. REV. 401, 417 (1994).

<sup>441</sup> See *Vogel v. Marathon Oil Co.*, 879 N.W.2d 471, 480 (N.D. 2016) (holding that the Environmental Law Enforcement Act of 1975 “provides a private right of action for a person aggrieved by an alleged violation of an environmental statute”).

<sup>442</sup> See, e.g., *Lansing Schs. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 699 (Mich. 2010) (establishing Michigan state standing principles in the wake of *Lujan*); Kenneth Charette, Comment, *Standing Alone?: The Michigan Supreme Court, the Lansing Decision, and the Liberalization of the Standing Doctrine*, 116 PENN STATE L. REV. 199, 200 (2011); *Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796, 806 (Minn. Ct. App. 2001) (examining standing principles relating to injury in fact in Minnesota); *White v. Minn. Dep’t of Nat. Res.*, 567 N.W.2d 724, 737–38 (Minn. Ct. App. 1997) (establishing criteria for a prima facie violation of the Minnesota Environmental Rights Act); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 723 (2006) (examining both the Michigan and Minnesota statutes); *Burton v. Comm’r of Env’t Prot.*, 970 A.2d 640, 650 (Conn. 2009) (establishing similar standing principles in Connecticut).

While modern federal courts refuse to locate positive rights in the U.S. Constitution, most state constitutions *do* expressly guarantee positive rights, including the rights to education, health, labor organizing, and, significantly, a clean environment.<sup>443</sup> At first glance, the existence of an independent, underlying right could provide a clear binary test for the acceptability of nuisance abatement laws: that is, MEPA is good because it is simply individuals enforcing rights they already enjoy; S.B. 8 is bad because it is individuals limiting the rights of others while protecting no rights of their own.<sup>444</sup> Such a test would be in keeping with the logic of public nuisance—defined, after all, as “an unreasonable interference with a right common to the general public.”<sup>445</sup> Upon deeper inspection, however, such a test would be problematic.

In the late nineteenth and early twentieth centuries, many states enacted environmental amendments, but these were generally narrow—requiring the state to responsibly manage natural resources, say, or detailing water policies.<sup>446</sup> In the 1960s and 1970s, however, fourteen states added “broad conservation provisions [to their] constitutions (often dubbed ‘environmental bills of rights’).”<sup>447</sup> Several of these included language along the lines of: “Each person has the right to a healthful environment.”<sup>448</sup> The first state to enact such an amendment was Michigan, which in 1963 declared the protection of the natural resources of the state to be “of paramount public concern in the interest of the health, safety and general welfare of the people,” and directed the legislature to “provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.”<sup>449</sup> The Michigan Supreme Court interpreted MEPA as a direct response to the amendment’s exhortation.<sup>450</sup> Inspired by Sax’s writings, more than a dozen other states passed similar constitutional amendments over the next fifteen years, including Florida and Massachusetts, both of which

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<sup>443</sup> See generally EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 170–75 (2013) (describing how “the environmental mandates in state constitutions exhibit both of the defining features of positive rights”).

<sup>444</sup> Cf. Michaels & Noll, *supra* note 14 (manuscript at 24) (“[R]etrenching constitutional rights [is] neither [a] necessary nor sufficient feature[] of rights suppressing legislation.”).

<sup>445</sup> RESTATEMENT (SECOND) OF TORTS § 821B(1).

<sup>446</sup> ZACKIN, *supra* note 443, at 147–48.

<sup>447</sup> *Id.* at 150, 151 tbl.7.1.

<sup>448</sup> See *id.* at 150.

<sup>449</sup> MICH. CONST. art. 4, § 52.

<sup>450</sup> See *Ray v. Mason Cnty. Drain Comm’r*, 224 N.W.2d 883, 887 (Mich. 1975) (“[MEPA] marks the Legislature’s response to our constitutional commitment to the ‘conservation and development of the natural resources of the state . . . .’” (quoting MICH. CONST. art. 4, § 52)).

subsequently passed pollution abatement laws.<sup>451</sup> As mentioned above, Illinois and Hawaii also added environmental amendments, and theirs specifically enabled citizen suits to enforce the environmental rights laid out in the same provision.<sup>452</sup>

Several of the pollution abatement statutes, then, can be seen as enabling individuals to enforce their own underlying rights, even if they are not specially injured by the conduct over which they sue. In contrast, no state constitution contains a right to be free from red-light districts or prostitution.<sup>453</sup> For skeptics of S.B. 8 and red-light abatement statutes who might be open to pollution abatement statutes, the presence or absence of an underlying state constitutional right could provide grounds for embracing the latter while rejecting the former. Indeed, S.B. 8 and red-light abatement can be understood as enabling individuals to sue to *limit* the rights of others (that is, others' rights to obtain an abortion, financially support themselves, or have sex in the manner that they choose). More broadly, one could argue that the presence of pollution literally impacts every individual in an area—the air they breathe, the water they drink, the cancers they develop—in a far more direct way than the presence of sex work or abortion might impact them.

There are many hazards inherent in this framing, however. Most obviously, several states possessing pollution abatement laws never adopted environmental amendments to their constitutions. In addition, states could simply pass constitutional amendments guaranteeing a right to be free from sex work or some other supposed “moral nuisance.” The demand for the existence of an underlying right also limits individuals' ability to ameliorate social harms to those harms that are already recognized in statutes or constitutions. This could, in turn, restrict the flexibility of legislatures or judges to craft or affirm novel ways of eliminating dire threats. Indeed, as the scholar Emily Zackin noted, many of the environmental amendments of the 1960s and 1970s were worded in a deliberately vague manner to allow their guarantees “to grow and develop over time, perhaps even beyond their own, original conceptions.”<sup>454</sup> Finally, this rights-based framework would inevitably be a subjective one, as undoubtedly opponents of sex work or abortion would claim that the presence of that which they loathe infringes on

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<sup>451</sup> ZACKIN, *supra* note 443, at 173; FLA. CONST. art. 2, § 7 (added 1996); MASS. CONST. art. XCVII (added 1972).

<sup>452</sup> ILL. CONST. art. XI, § 2 (added 1970); HAW. CONST. art. XI, § 9 (added 1978).

<sup>453</sup> *But see* Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 13 (1993) (arguing that the “legal right to be free from torture and cruel and inhuman or degrading treatment” encompasses prostitution).

<sup>454</sup> ZACKIN, *supra* note 443, at 190.

their rights in some way. The existence of an underlying right, therefore, provides only a flawed bright-line test.

Indeed, the decisions of courts upholding or narrowing moral nuisance abatement statutes have presented *no* objective test for their constitutionality or limits. Nor, in my opinion, does history reveal any obvious limiting principle.

#### IV. AFTERLIVES

It should be clear by this point that moral nuisance abatement statutes have had significant effects on the policing and presence of sex work and pollution. This Part seeks to clarify that these laws likewise had significant effects even beyond the direct subjects of sex work and pollution, and even decades after citizens invoked these laws with any regularity. Most directly, some have invoked these laws (especially the red-light abatement acts) in attempts to enjoin “nuisances” that are increasingly unlike those that the laws were designed to target. More broadly, the *logic* undergirding these laws—that a private individual should be able to use the courts to eliminate social ills (from drug-dealing to climate change), regardless of whether these so-called “nuisances” directly injure the individual—became influential and spread. Based on the prevailing political winds—and the degree to which those winds buffeted the judiciary—the attempts to use red-light and pollution abatement laws beyond their textual ambits have been intermittently successful. More successful have been the attempts to define any alleged social ill as a “nuisance,” and to thereby enable private parties to sue for its abatement. S.B. 8 is inescapably a part of this trend.

It therefore stands to reason that even opponents of abortion should be wary of S.B. 8 and the copycats almost certain to follow in its wake. For while moral nuisance abatement laws can be powerful and effective, they almost invariably result in some unpredictable ripple effects. And, historically, many of these ripple effects resulted in considerable harm. Even before enforcement of California’s red-light abatement act began, for instance, San Francisco’s police commissioner announced an entirely new list of moral regulations in its wake, including, “no dancing in any cafes on afternoons or Sundays.”<sup>455</sup> No sooner had San Francisco shuttered its red-light districts than activists were calling for detention facilities for promiscuous women.<sup>456</sup> The afterlives of the red-light and pollution

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<sup>455</sup> *Mayor Rolph Will Appoint Vice Committee of 25*, S.F. CHRON., Jan. 27, 1917, at 1.

<sup>456</sup> *Rev. Smith Will Urge Farm for Magdalens*, S.F. CHRON., Mar. 3, 1917, at 5; *Bills for Care of Unfortunate Women Studied*, S.F. CHRON., Feb. 20, 1917, at 8; *Rev. Paul Smith Gives Vice Crusade Beliefs*, SAN JOSE MERCURY NEWS, Feb. 5, 1917, at 12.

abatement laws are instructive—and provide an ominous omen of things to come.

A. “Lewd” Dancing, Pornography, and Poverty as Nuisance

“The impact of the Red Light Abatement law on the formal legal system was relatively minor,” writes Peter Hennigan.<sup>457</sup> “Equity courts were not swamped with thousands of bills for injunctions.”<sup>458</sup> Searching for an impact, Hennigan points to the effect the laws had on “[a] type of laissez-faire landlordism” that had been prevalent in red-light districts.<sup>459</sup> Yet these laws *did* have a more significant impact: they normalized the use of nuisance actions as a means of empowering private citizens to impose their values on others via the courts. Further, they broadened the meaning of nuisance to encompass nearly anything that could plausibly be construed as immoral—including, as we shall see, “lewd” behavior, pornography, and even poverty. As the twentieth century passed, this normalization and broadening continued apace. (S.B. 8 can certainly be seen as part of this process.)

In the decades after the passage of the red-light abatement acts, legislators continued expanding their characteristic enforcement mechanism—a private cause of action to abate statutorily defined nuisances—into new realms. A number of states passed laws to allow private citizens to bring nuisance abatement actions against gambling houses.<sup>460</sup> By the 1950s, one commentator noted that “[s]everal states,” including California, Indiana, and Virginia, were among those that had statutorily enabled private individuals to seek injunctive relief against the unlicensed practice of professions, such as dentistry.<sup>461</sup> “Under the statute, a showing of personal damage is apparently not required,” this commentator wrote, sounding slightly disturbed.<sup>462</sup> “The result may well be non-uniform enforcement. The motive of the licensed practitioner in bringing suit and incurring expense is likely to be personal rather than a desire to protect the public interest.”<sup>463</sup> This system, he concluded, “is therefore difficult to justify.”<sup>464</sup>

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<sup>457</sup> Hennigan, *supra* note 42, at 181.

<sup>458</sup> *Id.*

<sup>459</sup> *Id.* at 181–82.

<sup>460</sup> See *State ex rel. Whall v. Saenger Theatres Corp.*, 200 So. 442, 444 (Miss. 1941); *Pompano Horse Club v. State ex rel. Bryan*, 111 So. 801, 804 (Fla. 1927).

<sup>461</sup> J. Donald Cairns, Comment, *Injunctive Relief Against Unlicensed Practice of Occupations and Professions*, 18 OHIO STATE L.J. 402, 408 (1957).

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> *Id.* at 409.

Just as common were attempts to apply existing red-light abatement statutes far more broadly than their authors likely imagined.<sup>465</sup> In response to urban uprisings and the sexual revolution of the 1960s and 1970s, authorities in many states began trying to use the decades-old laws to shutter other visible manifestations of “vice”—namely, pornographic bookstores, movie theaters, and nude or “lewd” dancing.<sup>466</sup> The first time an appellate court reviewed the use of a red-light abatement law to abate live adult performance,<sup>467</sup> it blessed it, although the court added that this law “cannot be used to prohibit free expression that is not obscene.”<sup>468</sup> California courts continued to approve the use of this statute to abate “lewd” dancing,<sup>469</sup> but they refused to expand it to encompass adult bookstores or movie theatres.<sup>470</sup> Courts in other states likewise refused to hold that red-light abatement statutes applied to such “obscene” establishments in the absence of live obscenity (i.e., dancing).<sup>471</sup> Only Alabama allowed such a law—which had previously “been applied exclusively to houses of prostitution”<sup>472</sup>—to be used against an adult movie theater.<sup>473</sup> A number of legal scholars decried

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<sup>465</sup> See *State Regulation of Obscene Motion Pictures: The Red Light Nuisance Statute*, 31 ALA. L. REV. 274, 285–86 (1980).

<sup>466</sup> Herald Price Fahringer & Paul J. Cambria Jr., *The New Weapons Being Used in Waging War Against Pornography*, 7 CAP. U. L. REV. 553, 564, 573 (1978) (“Recently, an old species of nuisance law, known as the ‘red-light’ abatement statute, has been rolled upon the firing line and used for abolishing businesses displaying adult films.”); see *infra* notes 469–470.

<sup>467</sup> Donald Lewis Briggs, *Sarong Gals: Green Light for the Red Light Abatement Law*, 1 PEPP. L. REV. 116, 116 (1973).

<sup>468</sup> *People ex rel. Hicks v. Sarong Gals*, 103 Cal. Rptr. 414, 418 (1972). Previously, a California court had held that the red-light abatement law could not be used to abate obscene films, but it had implied in dicta that live lewd shows were different. See *Harmer v. Tonylyn Productions, Inc.*, 100 Cal. Rptr. 576, 576–77 (1972).

<sup>469</sup> *People ex rel. Sorenson v. Randolph*, 160 Cal. Rptr. 69, 71–72 (1979).

<sup>470</sup> *People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600, 611–12 (Cal. 1976); Sharon Anne Watkins, *The Devil and the D.A.: The Civil Abatement of Obscenity*, 28 HASTINGS L.J. 1329, 1330 (1977).

<sup>471</sup> See, e.g., *State ex rel. Cahalan v. Diversified Theatrical Corp.*, 240 N.W.2d 460, 461 (Mich. 1976); *State ex rel. Faches v. N.D.D., Inc.*, 228 N.W.2d 191, 193 (1975); *Southland Theatres, Inc., v. State ex rel. Tucker*, 492 S.W.2d 421, 423 (Ark. 1973); *Gulf States Theatres of La., Inc. v. Richardson*, 287 So. 2d 480, 485–86 (La. 1973); *People v. Goldman*, 287 N.E.2d 177, 178–79 (Ill. 1972); *State ex rel. Murphy v. Morley*, 317 P.2d 317, 318–19 (N.M. 1957).

<sup>472</sup> *State Regulation of Obscene Motion Pictures: The Red Light Nuisance Statute*, *supra* note 465, at 284–85.

<sup>473</sup> *Trans-Lux Corp. v. State ex rel. Sweeton*, 366 So.2d 710, 715 (Ala. 1979). Note, however, that other states allowed red-light abatement laws to be used to shutter sites of public masturbation, including pornographic bookstores. *People v. Adult World Bookstore*, 166 Cal. Rptr. 519, 521 (1980); see also Deborah A. Waldbillig, Note, *Padlock Orders and Nuisance Laws: The First Amendment in Arcara v. Cloud Books*, 51 ALB. L. REV. 1007, 1023–24, 1029–31 (1987) (noting cases upholding establishment closures).

the use of red-light abatement against “lewd” material.<sup>474</sup> Writing in the late 1970s, Doug Rendleman dismissed existing red-light and nuisance doctrine as “too elastic, too imprecise, and too anachronistic to be used to close bookstores and theaters.”<sup>475</sup> Another pair of scholars called red-light abatement statutes “dangerous” and wrote that they should be “conservatively applied.”<sup>476</sup>

Despite these warnings, advocates continued their attempts to adapt existing law to attack “lewdness” and “obscenity.” Throughout the 1970s, state courts disagreed vehemently over whether general public nuisance statutes could be used to shutter “lewd” dancing, theaters, or bookstores,<sup>477</sup> and the Supreme Court provided little guidance.<sup>478</sup> Several state legislatures even amended their red-light abatement statutes specifically to include obscene motion pictures,<sup>479</sup> but in 1980 (and again in 1981) the Supreme Court “effectively foreclosed” this movement<sup>480</sup> when it declared that the use of such a statute to secure an injunction against an adult theater was unconstitutional.<sup>481</sup>

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<sup>474</sup> See, e.g., *State Regulation of Obscene Motion Pictures: The Red Light Nuisance Statute*, *supra* note 465, at 304 (“Although carefully drawn, narrowly construed public nuisance statutes may be a valid and effective weapon against obscenity, traditional red light abatement statutes cannot be characterized as sufficiently sensitive to first amendment freedoms.”).

<sup>475</sup> Doug Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509, 527 (1977).

<sup>476</sup> Fahringer & Cambria, *supra* note 466, at 574.

<sup>477</sup> Some courts interpreted nuisance statutes to cover sex shops and pornographic bookstores or theaters. *Commonwealth ex rel. Lewis v. Allouwill Realty Corp.*, 478 A.2d 1334, 1334 (Pa. Super. Ct. 1984); *People ex rel. Busch v. Projection Room Theater*, 550 P.2d 600, 606 (Cal. 1976); *Cactus Corp. v. State ex rel. Murphy*, 480 P.2d 375, 378 (Ariz. 1971). Others declined to use nuisance statutes to shutter such establishments. *Napro Dev. Corp. v. Town of Berlin*, 376 A.2d 342, 349 (Vt. 1977); *State ex rel. Field v. Hess*, 540 P.2d 1165, 1170 (Okla. 1975); *Commonwealth v. MacDonald*, 347 A.2d 290, 300 (Pa. 1975).

<sup>478</sup> *Miller v. California*, 413 U.S. 15, 36 (1973) (holding states can regulate sexually explicit materials, but not describing what types of regulations are constitutional); John N. Dinan, *Constitutional Law—Nuisance Abatement—Alabama’s Red Light Abatement Act Held Applicable to Obscene Movies as Permanently Enjoinable Nuisances*, 10 CUMB. L. REV. 593, 599 (1979) (“Reflecting on this recent case law, it has become increasingly clear that the common law nuisance standards regarding obscenity are much too vague and incoherent to comport with those required by modern first amendment interpretation.”).

<sup>479</sup> Carolin D. Bakewell, *Constitutional Law—The Constitutionality of North Carolina’s Nuisance Abatement Statute: A Prior Restraint on Nonobscene Speech*, 61 N.C. L. REV. 685, 685 n.1 (1983); *State Regulation of Obscene Motion Pictures: The Red Light Nuisance Statute*, *supra* note 465, at 275 n.7, 292 n.134.

<sup>480</sup> Rosalee C. Gorman, *The Demise of Civil Nuisance Actions in Obscenity Control*, 14 LOY. U. CHI. L.J. 31, 45 n.108 (1982).

<sup>481</sup> *Brockett v. Spokane Arcades, Inc.*, 454 U.S. 1022 (1981); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 309, 310 (1980) (per curiam). *But see State ex rel. Kidwell v. U.S. Marketing, Inc.*,

Nonetheless, the logic undergirding this movement—that sin constituted nuisance and private citizens should be able to use the courts to abate such nuisances—continued to expand into new areas. State authorities began relying on public nuisance statutes to “abate” such nuisances as drug-dealing,<sup>482</sup> urban street gangs,<sup>483</sup> nude bathing,<sup>484</sup> and other manifestations of poverty or “vice.” “Local governments across the United States are increasingly enacting and ramping up enforcement of public nuisance laws to tackle . . . urban blight more generally, excessive noise, annoying pets, gangs, drug use, sex offenders, and suspicious hangouts,” observed one student note from 2008.<sup>485</sup> Perhaps unsurprisingly, such a broad use of nuisance laws has resulted in the harassment of poor people and people of color.<sup>486</sup> More recently still, “chronic nuisance ordinances” have empowered landlords to evict tenants based on “nuisance behavior,” defined to include everything from suspected criminal conduct to making an “excessive” number of 911 calls.<sup>487</sup> This, too, disproportionately burdens marginalized communities.<sup>488</sup>

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631 P.2d 622 (Idaho 1981) (narrowly upholding the constitutionality of the Idaho Moral Nuisance Abatement Act, which enabled citizen suits as well as state actions); *Chateau X, Inc. v. State ex rel. Andrews*, 275 S.E.2d 443, 445 (N.C. 1981) (narrowly distinguishing *Vance*). For more on the afterlife of *Brockett*, see Amy L. Swingen, *Federal Court Interpretation of the Washington Obscenity Statute*, 61 WASH. L. REV. 1237 (1986).

<sup>482</sup> *State ex rel. Freeman v. Pierce*, 573 N.E.2d 747, 748–49 (Ohio Ct. App. 1991); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1342 (1991); see also Omar Saleem, *Killing the Proverbial Two Birds with One Stone: Using Environmental Statutes and Nuisance to Combat the Crime of Illegal Drug Trafficking*, 100 DICK. L. REV. 685, 709–19 (1996) (describing several examples of states applying public nuisance statutes to address illegal drug-trafficking disputes).

<sup>483</sup> Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 411 (1999).

<sup>484</sup> *Mark v. State Dep’t of Fish and Wildlife*, 974 P.2d 716, 717 (Or. Ct. App. 1999).

<sup>485</sup> Bryan M. Seiler, Note, *Moving from “Broken Windows” to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 884 (2008). This accords with the way that police and prosecutors use public nuisance actions to sidestep procedural protections criminal defendants are supposed to enjoy. See Brendan M. Conner, *Fine-Tuning: The Emergent Order-Maintenance Architecture of Local Civil Enforcement*, 42 PACE L. REV. 138, pt. II.A (2021).

<sup>486</sup> See Melanie Ochoa, *LAPD Gang Injunctions Gave Cops a License to Harass and Control Black and Latino Residents*, ACLU (Mar. 23, 2018, 5:45 PM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/lapd-gang-injunctions-gave-cops-license-harass-and-control> [https://perma.cc/KDM3-K7ZB].

<sup>487</sup> Alisha Jarwala & Sejal Singh, *When Disability Is a “Nuisance”: How Chronic Nuisance Ordinances Push Residents with Disabilities out of Their Homes*, 54 HARV. C.R.-C.L. L. REV. 875, 878–79 (2019).

<sup>488</sup> *Id.* at 879; see also *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, ACLU, <https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime> [https://perma.cc/

### B. Climate Change as Nuisance

As the imperfections of the canonical environmental statutes became plain, advocates continued turning to nuisance actions and the logic undergirding them. Writing in 1984, the legal scholar Alan Weinstein noted that while the “availability of nuisance actions potentially conflicts with . . . legislative goals of uniformity, ease of administration, and certainty,” nuisance law has also historically served “to ‘fill in the gaps’ left by more comprehensive legislative schemes and, arguably, could still be used to remedy pollution problems overlooked by legislators and regulators.”<sup>489</sup> As the decades passed, it started to seem obvious that the problem most glaringly overlooked by those in power was climate change. And without a comprehensive statutory framework, many started to turn to nuisance actions to fill this gap. Indeed, as early as 1968, the pioneering environmental attorney Vic Yannacone argued in an action to enjoin development of fossil beds that air pollution “can cause climatic changes,” leading a Tenth Circuit Judge to ask, “What right have we to control the use of private land”—“unless,” he continued, “there’s a nuisance perpetrated by the owners?”<sup>490</sup>

The possibility of federal nuisance actions was ultimately foreclosed by the Supreme Court in 2011, which unanimously held that the Clean Air Act displaced the federal common law of nuisance as a means to address climate change.<sup>491</sup> But state actions have, thus far, remained viable. In the last four years, numerous cities and counties have brought nuisance actions against fossil fuel companies.<sup>492</sup> While, as of the writing of this Article, a few of these

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DC9K-TFCB] (stating that nuisance ordinances have been found to “disproportionately impact and be disparately enforced against communities of color and persons with mental disabilities”); Scout Katovich & Sandra Park, *Across New York, People of Color and the Poor Can Face Eviction for Calling 911*, ACLU (Aug. 10, 2018, 11:00 AM), <https://www.aclu.org/blog/womens-rights/women-and-criminal-justice/across-new-york-people-color-and-poor-can-face> [https://perma.cc/QNH8-SKY4] (analyzing enforcement data from New York authorities to show that nuisance ordinances “are most often enforced in communities of color and where poor people live . . . and harm domestic violence survivors and those in need of emergency medical assistance”).

<sup>489</sup> Alan Weinstein, *The Reemergence of Nuisance Law in Environmental Litigation*, 36 LAND USE L. & ZONING DIG. 3, 3 (1984). For a recent article arguing similarly, see Doug Rendleman, *Rehabilitating the Nuisance Injunction to Protect the Environment*, 75 WASH. & LEE L. REV. 1859, 1878–80 (2018).

<sup>490</sup> Barbara Browne, *Court Order Halts Fossil Bed Project*, ROCKY MOUNTAIN NEWS, July 11, 1969, at 1.

<sup>491</sup> *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011). For more on this decision, see Brian A. Bender, *Climate Change Public Nuisance Litigation: Contextualizing AEP v. Connecticut*, 23 ENV’T CLAIMS J. 177 (2011). Earlier federal climate nuisance actions had fallen on standing and political question grounds. See Sean Mullen, Note, *The Continuing Vitality of the Climate Change Nuisance Suit*, 63 RUTGERS L. REV. 697, 702–06 (2011).

<sup>492</sup> For a discussion of several of these actions, see Rachel Rothschild, Note, *State Nuisance Law and the Climate Change Challenge to Federalism*, 27 N.Y.U. ENV’T L.J. 412, 414–15 (2019).

suits have been dismissed,<sup>493</sup> several others remain viable,<sup>494</sup> and numerous scholars have argued that existing state precedent supports such actions.<sup>495</sup> Yet, without a moral nuisance abatement statute, the common law's limitations come back into play. Thus, such actions have, by necessity, had to rely on the special injury rule. Nuisance is an appropriate theory, New York City wrote in one such complaint, because climate impacts are "indivisible injuries," although the City itself "ha[d] suffered injuries beyond those of the community at-large."<sup>496</sup>

In the meantime, a number of pollution abatement laws, as well as state constitutional environmental provisions, remain live—albeit oft-overlooked—weapons in the environmental arsenal. Several state courts have affirmed pollution abatement laws' statutory grants of standing in spite of the more restrictive federal standing doctrine,<sup>497</sup> and some courts have recently interpreted the laws in radical ways. In 2004, for instance, the South Dakota Supreme Court ruled that it "[ou]nd the public trust doctrine manifested in" the state's environmental citizen-suit statute, which authorized legal action to protect "the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."<sup>498</sup> The court concluded "in accord with the State's sovereign powers and the legislative mandate, that all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public."<sup>499</sup> While South Dakota's law has barely been used over

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<sup>493</sup> City of New York v. Chevron Corp., 993 F.3d 81, 85 (2d Cir. 2021); Notice of Voluntary Dismissal at 2, King Cnty. v. BP p.l.c., No. 18-cv-00758, 2018 WL 9440497 (W.D. Wash. Sept. 28, 2021), [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210928\\_docket-218-cv-00758\\_notice-of-voluntary-dismissal.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210928_docket-218-cv-00758_notice-of-voluntary-dismissal.pdf) [<https://perma.cc/U9DW-MBGV>].

<sup>494</sup> See BP p.l.c. v. Mayor of Baltimore, 141 S. Ct. 1532 (2021); Anne Arundel Cnty. v. BP p.l.c., No. 21-cv-01323 (D. Md. filed Apr. 26, 2021); Annapolis v. BP p.l.c., No. 21-cv-00772 (D. Md. filed Feb. 2, 2021); City of Charleston v. Brabham Oil Co., No. 20-cv-03579 (D.S.C. filed Sept. 9, 2020); Cnty. of San Mateo v. Chevron Corp., No. 20-884 (9th Cir. filed July 7, 2021); City of Oakland v. BP p.l.c., No. 20-1089 (9th Cir. filed Sept. 19, 2017); John Schwartz, *Supreme Court Gives Big Oil a Win in Climate Fight with Cities*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/2021/05/17/climate/supreme-court-baltimore-fossil-fuels.html> [<https://perma.cc/NKLA-V3LB>].

<sup>495</sup> See Rothschild, *supra* note 492, at 416, 423; Albert C. Lin & Michael Burger, *State Public Nuisance Claims and Climate Change Adaptation*, 36 PACE ENV'T L. REV. 49, 60–64 (2018).

<sup>496</sup> Complaint at 58–59, City of New York v. BP p.l.c., 325 F. Supp. 3d 466 (S.D.N.Y. 2018), [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180109\\_docket-118-cv-00182\\_complaint-1.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180109_docket-118-cv-00182_complaint-1.pdf) [<https://perma.cc/39ZW-Q784>].

<sup>497</sup> See *supra* note 442.

<sup>498</sup> Parks v. Cooper, 676 N.W.2d 823, 838 (S.D. 2004) (citing S.D. CODIFIED LAWS § 34A-10-1 (1973)).

<sup>499</sup> *Id.* at 338–39.

the past half century,<sup>500</sup> this decision gestures to a growing willingness on the part of judges to interpret environmental statutes broadly. In Pennsylvania, the state supreme court has repeatedly—first in 2013 and then in 2017<sup>501</sup>—interpreted its little-used environmental constitutional amendment<sup>502</sup> in a startlingly bold manner.

More broadly, one could certainly argue that the undergirding logic of nuisance abatement is present in the “atmospheric trust” cases—that is, *Juliana v. United States* and other recent cases in which advocates have sought to compel governments to meaningfully address climate change.<sup>503</sup> Underlying such suits is the idea that any private individual can and should use the courts to compel those in power to *stop violating our common rights*. Interestingly, Joseph Sax himself signed on to an amicus brief supporting an early atmospheric trust suit, *Alec L. v. Jackson*,<sup>504</sup> in one of his last public actions before his death just four months later.<sup>505</sup> Back in 1970, Sax had written that MEPA “recognizes that every citizen, simply by virtue of his status as a member of the public, has an enforceable right to a decent environment.”<sup>506</sup> Now Sax and the other professors declared that the “underlying rationale” of the suit is that the “protection of air and atmosphere [i]s a subject of public concern ‘in which the whole people are interested.’”<sup>507</sup>

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<sup>500</sup> Note, however, that state courts have repeatedly upheld the legislature’s grant of a cause of action. See *In re Solid Waste Disposal Permit Application of Clay*, 295 N.W.2d 328, 330–31 (S.D. 1980); *Basin Elec. Power Coop. v. Payne*, 298 N.W.2d 385, 387 (S.D. 1980); John H. Davidson, *South Dakota’s Public Trust Doctrine: Conserving Natural Resources in the Twenty-First Century*, 62 S.D. L. REV. 397 (2017).

<sup>501</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951, 978 (Pa. 2013); *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 931–33 (Pa. 2017).

<sup>502</sup> See John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I—An Interpretative Framework for Article I, Section 27*, 103 DICK. L. REV. 693, 696 (1999); Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENV’T L.J. 123, 124 (1990) (describing efforts to use the amendment as “unsuccessful”); PA. CONST. art. I, § 27.

<sup>503</sup> *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020); see also Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 21 (2017) (“The *Juliana* case is part of a wave of atmospheric trust litigation . . .”). See generally Randall S. Abate, *Atmospheric Trust Litigation: Foundation for a Constitutional Right to a Stable Climate System?*, 10 GEO. WASH. J. ENERGY & ENV’T L. 33, 36 (2019) (explaining the atmospheric trust litigation theory which found youth plaintiffs to compel governments “to protect the atmosphere for the benefit of their citizens”); Mary Christina Wood, *Law and Climate Change: Government’s Atmospheric Trust Responsibility*, 38 ENV’T L. REP. 10652, 10657 (2008).

<sup>504</sup> 863 F. Supp. 2d 11, 13–14 (D.D.C. 2012), *aff’d*, 561 Fed. App’x 7 (D.C. Cir. 2014).

<sup>505</sup> See Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants Seeking Reversal, *Alec L. v. Jackson*, 561 Fed. App’x 7 (D.C. Cir. 2014) (No. 13-5192) [hereinafter Brief of Law Professors]. Sax died on March 9, 2014. Martin, *supra* note 172.

<sup>506</sup> Joseph Sax, *Environment in the Courtroom*, SATURDAY REV., Oct. 3, 1970, at 57.

<sup>507</sup> Brief of Law Professors, *supra* note 505, at 20 (quoting *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892)).

The court ruled contrary to Sax and the professors, but atmospheric trust litigation continues. Some of the most intriguing abatement-inspired moves in the climate space have been undertaken at the local level. In Grant Township, Pennsylvania, for instance, the community charter has created a private right of action for any resident of the township to enforce the charter's prohibition against dumping the waste produced by oil or gas extraction, or for any resident to enforce the "rights" of "[e]cosystems and natural communities within Grant Township."<sup>508</sup> In 2016, the local government passed an ordinance allowing residents to assert such rights through "nonviolent direction action" and prohibiting "any private or public actor from bringing criminal charges or filing any civil or any other criminal action against those participating in nonviolent direction action."<sup>509</sup>

#### WHAT CAN WE DO? WHAT SHOULD WE DO?

Perhaps unsatisfyingly, I conclude this Article on notes of caution and uncertainty. Is S.B. 8 our future? Regardless of how widely used Texas's uniquely harmful abatement statute ultimately proves to be, its undergirding logic and characteristic enforcement mechanism seem likely to persist and spread. Opponents of S.B. 8 (myself included) must address this reality squarely and with clear-eyed pragmatism, as well as with an eye toward how we, too, can utilize the means of private enforcement toward ends we believe to be just.

The purpose of this Article is not to present a bright-line test for assessing the constitutionality of moral nuisance abatement statutes. Rather, it is to reveal the long history of these statutes and to complicate sweeping generalizations with respect to their characteristic enforcement mechanism. In my eyes, the pollution abatement statutes were justified by the need to protect the common good; the red-light abatement statutes were *not* justified because they sought only to further punish the marginalized, not to vouchsafe the commons. Of course, the advocates of the red-light abatement statutes felt differently—as do the champions of S.B. 8. Indeed, the Texas law's supporters would undoubtedly characterize it in precisely those terms—safeguarding the common good, protecting the powerless. This is politics, and political struggle is inevitable, and law is inevitably political.

Texas's law is an abomination because it seeks to destroy abortion rights. It is an abomination because it seeks to insulate itself from virtually

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<sup>508</sup> CHARTER COMM'N, TWP. OF GRANT, PA., HOME RULE CHARTER OF THE TOWNSHIP OF GRANT, INDIANA COUNTY, PENNSYLVANIA, art. III, § 305, <https://celdf.org/wp-content/uploads/2016/02/Grant-Township-Community-Rights-Home-Rule-Charter.pdf> [perma.cc/2EBA-WPF5].

<sup>509</sup> TED HAMILTON, BEYOND FOSSIL LAW: CLIMATE, COURTS AND THE FIGHT FOR THE FUTURE 295–96 (2022).

any democratic or juridical check. It is an abomination because it seeks to deputize the powerful to harass the less powerful. But it is not an abomination because of its underlying logic of citizen enforcement.

